(24,387)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 643.

AMERICAN SURETY COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

GEORGE S. SCHULTZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1914.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between George S. Shultz, plaintiff, and American Surety Company of New York, defendant, a manifest error hath happened to the great damage of the said defendant, American Surety Company of New York, as by its complaint appears; we, being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on October fifth next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 5th day of September in the year of our Lord one thousand nine hundred and fourteen.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States for the Southern District of New York.

Allowed by

J. M. MAYER,
Judge of the United States District Court for the Southern District of New York.

2 [Endorsed:] L. 13/64. Supreme Court of the U. S. American Surety Co., of N. Y., Plaintiff in error, against George S. Schultz, Defendant in error. (Original.) Writ of Error. Henry C. Willcox, Attorney for Plaintiff in error, 100 Broadway, New York City. U. S. District Court, S. D. of N. Y. Filed Sept. 5, 1914.

3 *Summons.*

United States District Court, Southern District of New York.

L. 13–64.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Charles M. Hough, Judge of the District Court of the United States, for the Southern District of New York, at the Borough of Manhattan in the City of New York, this 24th day of July, in the year one thousand nine hundred and fourteen.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

KELLOGG & ROSE,
Attorneys for Plaintiff.

Office & Post Office Address: #115 Broadway, Manhattan, New York City.

4 United States District Court, Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
vs.
AMERICAN SURETY COMPANY, Defendant.

Præcipe.

The Clerk is requested to issue summons against the following named defendant, vis: American Surety Company. The residence of plaintiff is 50 West 130th Street, Borough of Manhattan, New York City.

The office address of plaintiff's attorneys of record is 115 Broadway, New York City, and all papers in this cause may be served upon said attorneys, Kellogg & Rose, at No. 115 Broadway, New York City.

KELLOGG & ROSE,
Attorneys for Plaintiff.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jul- 24, 1914.

5 *Proof of Service of Summons.*

United States District Court, Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Asa B. Kellogg, being duly sworn, deposes and says that he is the managing clerk in the office of Kellogg & Rose, attorneys for the plaintiff herein, and that on the 24th day of July, 1914, at 100 Broadway, in the Borough of Manhattan, New York City, deponent then being over the age of twenty-one years, he served the annexed Summons and Complaint personally upon the above named American Surety Company of New York, the defendant herein, by delivering copies thereof to Henry C. Willcox, personally, and leaving the same with him; that he knew the said Henry C. Willcox to be at that time the Vice-President of the said American Surety Company of New York, and knew the Corporation so served to be the Company mentioned and described in said Summons and Complaint as the defendant in this action.

ASA B. KELLOGG.

Sworn to before me this 24th day of July, 1914.
[SEAL.] LAWRENCE L. CASSIDY,
Notary Public, #654, N. Y. County.

6 *Complaint.*

United States District Court, Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

The plaintiff complains of the defendant and respectfully shows to this Court:

First. That heretofore and at all the times hereinafter mentioned, the plaintiff was and now is a resident of the City and County of New York.

Second. That the defendant the American Surety Company is a domestic corporation duly organized and existing under the Laws of the State of New York.

Third. That on April 30th, 1912, an action was begun by this plaintiff against James A. Whitcomb in the Supreme Court of the State of New York to recover the sum of $30,566.56 as damages for breach of a contract, which action was thereafter removed by the

said James A. Whitcomb to the United States Circuit Court,
7 for the Southern District of New York.

Fourth. That thereafter said action was tried and a verdict rendered in favor of this plaintiff and against the said James A. Whitcomb, for $24,607.95, and a judgment was entered upon said verdict in favor of plaintiff and against the said James A. Whitcomb on June 14th, 1913, in the Office of the Clerk of the United States District Court, for the Southern District of New York, for the sum of $25,106.50.

Fifth. That thereafter and from the judgment so entered a writ of error was sued out by the said James A. Whitcomb, to review the said judgment by the United States Circuit Court of Appeals, for the Second Circuit.

Sixth. That in conformity with the Statute in such case made and provided, the defendant herein and said James A. Whitcomb, duly made and filed with the Clerk of the U. S. District Court, for the Southern District of N. Y., and delivered to the plaintiff, in connection with such action or proceeding, its certain bond or undertaking under seal, in words or terms as follows:—

8 "District Court of the United States for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
JAMES A. WHITCOMB, Defendant.

Know all men by these presents, That we, James A. Whitcomb, of McAlester, Oklahoma, as Principal, and the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, New York City, New York, as Surety, are held and firmly bound unto the above-named George S. Shultz, his executors, administrators and assigns; in the sum of thirty thousand dollars ($30,000), lawful money of the United States of America, to be paid to the said George S. Shultz, his executors, administrators and assigns; for the payment of which well and truly to be made, we jointly and severally bind ourselves and our respective executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated the tenth day of July, in the year of our Lord, one thousand nine hundred and thirteen.

Whereas, the said James A. Whitcomb, has sued out a writ of error to the United States Circuit Court of Appeals for the Second Judicial Circuit, to reverse the judgment rendered in the above entitled suit by the District Court of the United States, for the Southern District of New York.

Now, therefore, the condition of this obligation is such, That if the above-named James A. Whitcomb shall prosecute his said writ of error to effect and answer all costs and damages that may be awarded against him if he shall fail to make his plea good, then this

obligation shall be void; otherwise, to remain in full force and virtue.

JAMES A. WHITCOMB. [L. S.]
AMERICAN SURETY COMPANY OF NEW YORK,
By MARSHALL L. BROWER,
Resident Vice-President.

Attest:
[L. S.] GEORGE R. CROSBY,
Resident Assistant Secretary."

9 Seventh. That thereafter, and on the 1st day of July, 1914, the mandate of the United States Circuit Court of Appeals, for the Second Circuit, was filed in the United States District Court for the Southern District of New York, affirming said judgment with $25 costs, and thereafter and on July 8th, 1914, an order was entered in said action directing that the judgment of the United States Circuit Court of Appeals, for the Second Circuit be made the judgment of the United States District Court for the Southern District of New York.

Eighth. That said James A. Whitcomb did not prosecute said writ of error to effect and failed to make his plea good whereby there was a breach of said bond and no part of said judgment of $25,106.50 or said costs, amounting to $25, or interest thereon, has been paid, although payment thereof has been duly demanded.

Wherefore, plaintiff demands judgment against the defendant for Twenty-five thousand one hundred six and 50.100 dollars ($25,106.50) with interest thereon from June 14th, 1913, and for $25 (Twenty-five dollars), with interest thereon from July 1st, 1914, besides the costs and disbursements of this action.

KELLOGG & ROSE,
Attorneys for Plaintiff.

Office & Post Office Address, #115 Broadway, Manhattan, New York City.

10 STATE OF NEW YORK,
County of New York, ss:

George S. Shultz, being duly sworn, says that he is the Plaintiff in this action. That he has read the foregoing Complaint and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

GEO. S. SHULTZ.

Sworn to before me this 24th day of July, 1914.
[SEAL.] LAWRENCE L. CASSIDY,
Notary Public, #654, N. Y. County.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Jul- 25, 1914.

11 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Demurrer.

Defendant demurs to the complaint herein, and for causes of said demurrer states:

(1) That it appears upon the face of said complaint that this Court has no jurisdiction of the subject matter of this action in that

(2) No diversity of citizenship of the parties is shown by said complaint, and

(3) That this action is an original action based solely upon a contract, towit, a bond, set forth in said complaint, and

(4) That neither the constitution nor any law of the United States is involved in the alleged cause of action set forth therein, and

(5) That this action does not involve the construction or application of such constitution or law, and

(6) That this action does not involve any question of the validity of such law, or of any State law, and

(7) That this action does not involve any matter or question within the jurisdiction of this or any United States Court.

Dated, August 3rd, 1914.

HENRY C. WILLCOX,
Attorney for Defendant,
100 *Broadway, Manhattan Borough, New York City.*

(*Enclosed:*) U. S. District Court, S. D. of N. Y. Filed Aug. 12, 1914.

12 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Notice of Motion upon Demurrer and for Judgment.

SIR: You will please take notice that the issues of Law raised by the demurrer of the defendant to the complaint of the plaintiff herein will be brought on for trial as a contested motion at a Stated Term of the United States District Court for the Southern District of New York, to be held at the Post Office Building in the City of New York, on the 26th day of August, 1914, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, and a motion will then and there be made for an order over-

ruling said demurrer with costs and for judgment absolute in favor of the plaintiff and against the defendant and for such other and further order or relief in the premises as to the Court may seem just and proper.

Yours, etc.,

KELLOGG & ROSE,
Attorneys for Plaintiff.

115 Broadway, New York City.

To Henry C. Willcox, Esq., Att'y for Def't, 100 Broadway, New York City.

Endorsed: U. S. District Court, S. D. of N. Y. Filed Aug. 26, 1914.

13 *Memorandum of Hazel, D. J.*

Upon the authority of

Arnold v. Frost, 9 Bend. 267
Crane v. Buckley, 105 Fed. 401
Egan v. Chicago G. N. R. Co. 163 Fed. 344
Files v. Davis, 118 Fed. 465

the demurrer is overruled. The Court has jurisdiction notwithstanding the absence of a diversity of citizenship and judgment may be entered in favor of Plaintiff.

JOHN R. HAZEL, *D. J.*

Endorsed: U. S. District Court, S. D. of N. Y. Filed Aug. 26, 1914.

14 *Order for Judgment.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York on the 27th Day of August, 1914.

Present: Hon. John R. Hazel, Judge.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

The motion to overrule the demurrer of the defendant herein and for judgment in favor of the plaintiff against the defendant upon the pleadings herein coming on to be heard,

Now on reading and filing the Summons and Complaint herein, the demurrer of the defendant, and the notice of motion, together with proof of service thereof, and after hearing Abram J. Rose, of Counsel in favor of the motion and Joseph M. Gazzam, of Counsel in opposition thereto, it is, on motion of Kellogg & Rose, attorneys for plaintiff,

Ordered that the demurrer of the defendant be and the same is hereby overruled, and it is

Further ordered that the plaintiff have judgment against the defendant on the pleadings herein for the amount demanded in the complaint, with costs and disbursements.

JOHN R. HAZEL, *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 27, 1914.

15 *Judgment.*

United States District Court for the Southern District of New York.

L. 13-64.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

The above named defendant having demurred to the complaint in this action and an order having been entered overruling said demurrer, and directing that the plaintiff recover judgment against the defendant for the amount demanded in the complaint, with costs

Now on motion of Kellogg & Rose, attorneys for plaintiff, it is

Ordered and adjudged that George S. Shultz, the plaintiff, have and recover judgment against the American Surety Company of New York, the defendant, for the sum of Twenty-six Thousand, nine hundred and fifty three and 38/100 Dollars ($26,953.38) damage together with nineteen and 30/100 ($19.30) Dollars costs amounting in all to the sum of Twenty-six thousand, nine hundred and Seventy-two and 68/100 Dollars ($26,972.68) and that he have execution therefor. Judgment signed and filed August 29, 1914.

August 29, 1914.

ALEX. GILCHRIST, JR., *Clerk.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 29, 1914.

16 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Certificate of Question of Jurisdiction.

To the Honorable the Supreme Court of the United States:

The District Court of the United States for the Southern District of New York hereby certifies to the Supreme Court of the United

States that on the 29th day of August, 1914, final judgment was entered in the above entitled action in favor of the plaintiff and against the defendant for the sum of $26,972.68 pursuant to the decision of this Court overruling the demurrer filed by the defendant upon all the grounds specified in said demurrer, which are as follows: (1) That it appears upon the face of said complaint that this Court has no jurisdiction of the subject matter of this action in that (2) No diversity of citizenship of the parties is shown by said complaint, and (3) That this action is an original action based solely upon a contract, to wit, a bond, set forth in said complaint, and (4) That neither the constitution nor any law of the United States is involved in the alleged cause of action set forth therein, and (5) That this action does not involve the construction or application of such constitution or law, and (6) That this action does not involve any question of the validity of such law, or of any State law, and (7) That this action does not involve any matter or question within the jurisdiction of this or any United States
17 Court; said demurrer to be sent up as part of the proceedings, together with this certificate and said judgment, the order upon which it was entered; the memorandum opinion or decision of this Court and the summons and the complaint to which said demurrer was interposed; said papers constituting the record before this Court, and showing that the sole question involved herein is that of the jurisdiction of this Court over the subject of this action; the defendant's contention upon said demurrer and upon the argument thereof, as particularly set forth in said demurrer being that this Court has no jurisdiction thereof, which contention has been overruled by the Court and said final judgment entered against the defendant as aforesaid, in accordance with said ruling.

The said question of jurisdiction raised herein is as follows:

Has the District Court of the United States for the Southern District of New York jurisdiction of a plenary action at law commenced by original process by a citizen of the State of New York against a corporation organized under the laws of said State to recover the sum of $25,106.50 exclusive of interest and costs upon a bond or undertaking executed by said corporation as surety and filed in the office of the Clerk of said Court for the purpose of procuring a supersedeas and stay of execution upon a writ of error to a judgment rendered in said Court in favor of the obligee and against the party who executed said bond as principal, which judgment so superseded and stayed had been entered in a plenary action at law brought by said obligee against said principal in the Supreme Court of the State of New York and by said principal removed to said
18 United States Court for the Southern District of New York; (the said surety not being a party to said action) it appearing that no question is raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given?

Given under the hand of a Judge of the District Court of the United States for the Southern District of New York, and under the seal of said Court, this 4th day of September, 1914, within the

term at which said decision, order and judgment were rendered, made and entered.

[SEAL.]

JOHN R. HAZEL,
United States District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

19 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant

Assignment of Errors.

Now comes the above named defendant by its attorney and presents the following assignment of errors in connection with the petition for a writ of error from the judgment herein out of the Supreme Court of the United States:

The Court erred:

1. In holding that the Court has jurisdiction of this action;
2. In overruling the defendant's demurrer to the complaint herein;
3. In granting the order entered on the 27th day of August, 1914, directing that the plaintiff have judgment against the defendant on the pleadings herein for the amount demanded in the complaint, with costs and disbursements;
4. In granting and entering the judgment rendered in favor of the plaintiff on the 29th day of August, 1914, for the sum of $26,972.68;
5. In rendering judgment against the defendant for any sum whatsoever.

Wherefore, defendant prays that said judgment entered on the 29th day of August, 1914, be reversed, and that the complaint herein be dismissed for want of jurisdiction in the said District Court.

Dated, New York, September 5th, 1914.

HENRY C. WILLCOX,
Attorney for Defendant.

100 Broadway, Manhattan Borough, New York City.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

20 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Petition for Writ of Error.

American Surety Company of New York, defendant herein, conceiving itself to be aggrieved by the judgment entered in the above entitled action on the 29th day of August, 1914, for the sum of Twenty-six Thousand Nine Hundred Seventy-two 68/100 ($26,-972.68) damages and costs, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said defendant all of which will more in detail appear in the assignment of errors filed with the petition, does hereby pray that a writ of error may be issued in its behalf out of the United States Supreme Court for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in the case, duly authenticated, may be sent to said United States Supreme Court, and that such other proceedings may be had as may be proper.

Dated, New York, September 5th, 1914.

HENRY C. WILLCOX,
Attorney for Defendant.

100 Broadway, New York City.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

21 United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Order Allowing Writ of Error.

Final judgment having been entered herein on the 29th day of August, 1914, in favor of the plaintiff and against the defendant in the sum of Twenty-six Thousand Nine Hundred Seventy-two 68/100 ($26,972.68) damages and costs upon the order entered herein on the 27th day of August, 1914, directing the said judgment and overruling the defendant's demurrer to the complaint herein, which was interposed upon the ground that this Court has no jurisdiction of the subject of this action, for the reasons particularly specified in said demurrer and in the certificate of the question of jurisdiction duly made by this Court; now comes the defendant by Henry C. Willcox,

its attorney and files herein and presents to the Court, its petition praying for the allowance of a writ of error out of the Supreme Court of the United States from such judgment, and assignment of errors intended to be urged by it; praying also that a transcript of the record, proceedings and papers in the case, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper; and said defendant offering to file a bond or undertaking in such sum as may be determined by the Court or by the Judge or Justice allowing such writ of error to be sufficient to perfect said writ of error, and to operate as a supersedeas, the condition of which bond or
22 undertaking will be that if the said defendant shall prosecute said writ of error to effect and answer all costs and damages that may be awarded against it if it shall fail to make its plea good, then such bond or undertaking shall be void; otherwise to remain in full force and virtue; it is hereby

Ordered that the writ of error of the defendant be allowed upon the defendant giving such bond or undertaking on said condition in the sum of Thirty Thousand Dollars ($30,000) said bond to be in lieu of all security upon said writ of error and to operate to stay execution for the enforcement of the judgment herein pending the determination of said writ of error and the coming down of the mandate of the Supreme Court of the United States.

Dated, New York, Sept. 5, 1914.

J. M. MAYER, *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

23 *Supersedeas Bond.*

United States District Court for the Southern District of New York.

GEORGE S. SHULTZ, Plaintiff,
against
AMERICAN SURETY COMPANY OF NEW YORK, Defendant.

Know all men by these presents, That we American Surety Company of New York, as Principal, and National Surety Company as surety, both corporations organized under the laws of the State of New York, are held and firmly bound unto George S. Shultz, in the full and just sum of Thirty Thousand ($30,000.00) Dollars, to be paid to said George S. Shultz, his executors, administrators or assigns; for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents. Sealed with our seals and dated the 5th day of September, in the year of Our Lord One Thousand Nine Hundred and Fourteen.

Whereas, the said American Surety Company of New York, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered against it in the above entitled

action by the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named American Surety Company of New York, shall prosecute its said writ of error to effect, and answer all costs and damages if it fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By L. E. CARMAN, *Vice-President.*

[SEAL.] NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice-President.

Attest:
E. M. McCARTHY,
Resident Assistant Secretary.

24 STATE OF NEW YORK,
County of New York, ss:

On this 5th day of September, 1914, before me personally came L. E. Carman to me known, who being by me duly sworn, did depose and say that he resides in Nutley, New Jersey; that he is the Vice-President of the American Surety Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

[SEAL.] (Sgn.) H. P. HOLLISTER,
Notary Public, Westchester County.

Certificate filed in New York County, New York County No. 7, New York Register No. 5060.

25 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 5th day of September one thousand nine hundred and fourteen before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of American Surety Company of New York as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions

of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of American Surety Company of New York is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Two Million ($2,000,000) dollars.

That —— —— is agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

[SEAL.] WM. A. THOMPSON.
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 5th day of September, 1914.

[SEAL.] H. E. EMMETT,
Notary Public.
(Officer's Signature, description and seal.)

Approval of Bond.

Within bond approved Sept. 5, 1914.

J. M. MAYER, *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Sep. 5, 1914.

26 UNITED STATES OF AMERICA, *ss:*

To George S. Shultz, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, on October fifth 1914, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein American Surety Company of New York is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 5th day of September, in the year of our Lord one thousand nine hundred and fourteen.

J. M. MAYER,
Judge of the District Court of the United States for the Southern District of New York.

27 [Endorsed:] L. 13-64. Supreme Court of the U. S. American Surety Co., of N. Y., Plaintiff in error, against George S. Shultz, Defendant in error. (Original.) Citation. Henry C. Willcox, Attorney for Plaintiff in error, 100 Broadway, New York City. U. S. District Court, S. D. of N. Y. Filed Sept. 8, 1914. L. 13/64.

Service of a copy of the within Citation is hereby admitted.
Dated Sept. 5th, 1914.

KELLOGG & ROSE,
Att'ys for Defendant in Error.

28 Supreme Court of the United States.

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff in Error (Defendant Below),
against
GEORGE S. SHULTZ, Defendant in Error (Plaintiff Below).

Præcipe to Clerk for Record on Writ of Error.

To the Clerk of the District Court of the United States for the Southern District of New York:

Please include in the record in error in the above case the following papers:

1. Summons and Præcipe therefor, and proof of service
2. Complaint
3. Demurrer
4. Notice of Motion for Judgment
5. Memorandum of Judge Hazel
6. Order for Judgment
7. Judgment
8. Certificate of question of Jurisdiction
9. Assignment of Errors
10. Order allowing writ of Error
11. Petition for Writ of Error
12. Writ of Error
13. Supersedeas Bond and Approval
14. Citation and proof of service
15. This Precipe.

and add to the above papers your certificate as required by law and by the practice of the Court.
Dated, September 16th, 1914.

Yours, etc., HENRY C. WILLCOX,
Attorney for Plaintiff in Error,
100 *Broadway, Manhattan Borough, New York City.*

Service of a copy of the within Præcipe is hereby admitted.
Dated, Sept. 16, 1914.

KELLOGG & ROSE,
Att'ys for Defendant in Error.

U. S. District Court, S. D. of N. Y. Filed Sep. 16, 1914.

29 UNITED STATES OF AMERICA,
Southern District of New York, ss:

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff-in-Error (Defendant Below),
vs.
GEORGE S. SHULTZ, Defendant-in-Error (Plaintiff Below).

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter and of the assignment of errors and all proceedings in the case, including the opinion of the Court.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this first day of October, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the said United States the one hundred and thirty-ninth.

[Seal District Court of the United States, South. Dist. N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

[Endorsed:] U. S. District Court, Southern District of New York. American Surety Co. of New York, Pl't'f-in-Error (Def't below), against George S. Shultz, Def't-in-Error (Pl't'f below). Transcript of Record on Appeal.

Endorsed on cover: File No. 24,387. S. New York D. C. U. S. Term No. 643. American Surety Company of New York, plaintiff in error, vs. George S. Schultz. Filed October 3d, 1914. File No. 24,387.

FILED

DEC 29 1914

IN THE

United States Supreme Court

OCTOBER TERM, 1914

No. 56

AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiff in Error
(Defendant below)

against

GEORGE B. SKELTY,
Defendant in Error
(Plaintiff below)

In Error to the District Court of the United States and the Supreme Court of New York

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

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CHARLES F. HARRIS
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Counsel
Of Counsel

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United States Supreme Court

AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff in error, against GEORGE S. SHULTZ, Defendant in error.	October Term, 1914. No. 643.

BRIEF FOR PLAINTIFF IN ERROR

This case comes before this Court upon writ of error to the United States District Court for the Southern District of New York, for the direct review of a judgment rendered in an action at law upon a supersedeas bond.

Statement of Facts

The present action which was commenced by original process (Summons p. 2, fol. 3) is between George S. Shultz, a resident and citizen of New York (Complaint, p. 3, f. 6), the plaintiff below, and American Surety Company of New York, a corporation organized under the laws of that state, the defendant below, (Complaint p. 3, f. 6). The action in which the bond was given was an action at law for damages for alleged breach of contract, brought by said George S. Shultz as plaintiff in the Supreme Court of the State of New York against one James A. Whitcomb, and was, by the latter removed to the said United States District Court (Complaint, pp. 3-4, ff. 6-7). Judgment was entered upon a verdict of a jury against Whitcomb in said action, and he sued out

a writ of error to the Circuit Court of Appeals, for the Second Circuit, and gave the bond which is the subject of the present action, to procure a supersedeas, pending the hearing of the writ of error (Complaint, p. 4, ff. 7-8). The judgment in the action of Shultz against Whitcomb was affirmed by said Court of Appeals, (Complaint, p. 5, f. 9). Shultz then brought this action against the defendant below as surety on said bond. Whitcomb is not a party to the present action. The Surety Company was not a party to the action against Whitcomb.

The Surety Company, the defendant below, demurred to the complaint on the following grounds: (1) That it appears upon the face of said complaint that the Court had no jurisdiction of the subject-matter of this action in that (2) No diversity of citizenship of the parties is shown by said complaint, and (3) That this action is an original action based solely upon a contract, to wit, a bond, set forth in said complaint, and (4) That neither the constitution nor any law of the United States is involved in the alleged cause of action set forth therein, and (5) That this action does not involve the construction or application of such constitution or law, and (6) That this action does not involve any question of the validity of such law, or of any state law, and (7) That this action does not involve any matter or question within the jurisdiction of this [the District Court] or any United States Court. (Demurrer, p. 6, f. 11.)

Upon the motion of Shultz, the plaintiff below, and against the opposition of the Surety Company, the defendant below, the District Court overruled the demurrer. (See Notice of Motion, p. 6, f. 12; Memorandum of Hazel, D. J., p. 7, f. 13. Order for Judgment, p. 7, f. 14; and Judgment, p. 8, f. 15.)

Thereupon the District Judge who rendered the decision made a certificate to this Court, showing that the

said Court had rendered final judgment in the action, upon overruling the demurrer; setting forth the grounds of the demurrer, (See Certificate of Question of Jurisdiction, pp. 8-10 ff. 16-18), and stating the question involved as follows:

The Question Certified

"Has the District Court of the United States for the Southern District of New York jurisdiction of a plenary action at law commenced by original process by a citizen of the State of New York against a corporation organized under the laws of said State to recover the sum of $25,106.50 exclusive of interest and costs upon a bond or undertaking executed by said corporation as surety and filed in the office of the Clerk of said Court for the purpose of procuring a supersedeas and stay of execution upon a writ of error to a judgment rendered in said Court in favor of the obligee and against the party who executed said bond as principal, which judgment so superseded and stayed had been entered in a plenary action at law brought by said obligee against said principal in the Supreme Court of the State of New York and by said principal removed to said United States Court for the Southern District of New York (the said surety not being a party to said action); it appearing that no question is raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given?" (Record, p. 9, ff. 17-18).

The Errors Assigned

These are (Record p. 10, f. 19) that the Court erred: (1) in holding that it had jurisdiction; (2) in overruling the demurrer to the complaint; (3) in granting the order

for judgment; (4) in entering judgment in favor of the plaintiff for the sum of $26,972.08; and (5) in rendering judgment against the defendant below for any sum whatever.

The Law of the Case

It is well settled that the lower federal courts are courts of limited statutory jurisdiction. It follows that the burden of establishing a new and independent ground of jurisdiction (not specifically conferred), should be upon the party asserting it. It is contended by the defendant in error, that the United States District Court has jurisdiction over this particular action of covenant upon a sealed instrument, because the enforcement of the obligation of a supersedeas bond is merely an incident of and a proceeding ancillary to a principal litigation in which the same federal court had jurisdiction upon one of the grounds specifically enumerated by the statute conferring jurisdiction. It would seem therefore, that unless the defendant in error could satisfy this Court either upon authority or principle, that an action of covenant on a supersedeas bond is merely ancillary to the action in which the bond was given, the question certified must be answered in the negative.

We submit that neither upon well considered precedent or authority, nor upon any established principle, may the enforcement of a supersedeas bond given under the federal statute be regarded as merely ancillary, but it is an independent common law action, that in the State of New York at least, it is so regarded, and that there is no New York State practice in conformity with which the federal courts in New York may deal summarily with this class of bonds.

The Law of the Case

We will first consider the cases cited by the learned District Judge below, as the basis for his assumption of jurisdiction, and the federal cases generally upon this point, and will then briefly endeavor to show that there is no analogy between common law actions to enforce common law obligations, and the chancery practice which permits the equity courts to deal summarily with bonds given as an incident to interlocutory relief, nor with that class of cases based upon state statute and state practice.

The Federal Cases

The earliest of the cases at all in point upon this jurisdictional question, and the one cited and relied upon in *Crane vs. Buckley,* 105 Fed. Rep., 401, which in turn was relied upon by the learned District Judge in deciding this case, below, was the case of *Seymour vs. Phillips Company,* 7 Biss., 460. In that case it was squarely decided that an action on a *supersedeas* bond begun by original process in the United States Court, was maintainable without reference to diverse citizenship or other special ground of jurisdiction as a case "arising under a law of the United States." The decision was based upon two grounds, one of convenience; and the other that it was proper that the federal court should entertain an action upon a *supersedeas* bond given under the federal statute for the reason that questions were *likely* to arise as to the meaning of the bond, its scope and the construction, scope and validity of the federal statute under which it was given. The entire argument upon which this decision rests has been disposed of by two recent adjudications of this Court, in which the opinions were delivered by Mr. Justice Van Devanter, defining clearly what is meant by "a case arising under a law of the United States." The first of these cases is that of *Shulthis vs. McDougal,* 225 U. S., page 561, in which (at page 569) the following language is used;

"A suit to enforce a right which takes its origin in the laws of the United States, is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

Again, in *Taylor vs. Anderson,* 234 U. S., 74, the Court in reaffirming this view as to what constitutes a case arising under a law of the United States, further decided that it is quite immaterial that there may arise or even that there is *likely* to arise in a suit which has its origin in a federal statute, some question concerning the scope and validity of the statute, unless the existence of such a question appears affirmatively from the necessary allegations of the plaintiff's pleading. In that very case the plaintiff sought to inject a federal question by anticipating in his pleading a defense against his claim which was founded upon a federal statute. The proper proceeding to raise such a question in this Court was pointed out by the District Judge in the case of *Taylor vs. Anderson,* 197 Fed. Rep., at p. 388, which was to wait until the construction or validity was drawn in question in the state court, and then take the case to this Court on appeal from the highest state court. From the foregoing, it would appear that the ground of decision of the leading case in point in the federal reports upon this question, has been invalidated by the decisions of this Court just referred to.

The principal case relied upon by the learned District Judge below, in disposing of this jurisdictional question, was *Arnold vs. Frost,* 9 Ben., 267. In that case another suggested ground was discovered and announced to wit: that an action to enforce a *supersedeas* bond is in the nature of an ancillary proceeding. *Arnold vs. Frost* cited as authority for this ground of decision, the case of *Jones vs. Andrews,* 10 Wallace, 327. That was a case

where a garnishment proceeding having been instituted in the Circuit Court, a bill filed in the same Court to enjoin those proceedings, was held to be not an original suit, but a defensive or supplementary suit, and one therefore that might be maintained irrespective of the diverse citizenship of the parties.

The distinction between an original suit and an ancillary one is both ancient and well established, and it is conceded that if a *supersedeas* bond is made the basis of purely ancillary proceedings in a federal court that the diversity of citizenship becomes unimportant. For instance, in the case of *Reilly vs. Golding,* 10 Wallace, 56, the facts were that a forthcoming bond had been given on an attachment, and a rule to show cause was issued in the original suit against the sureties on that bond, as was permitted by the state practice under a statute of Louisiana; that practice having been adopted by the United States Circuit Court, it was held that the proceeding there was merely incidental to the principal suit. The following cases also are based upon the same principle as *Reilly v. Golding,* namely that where the state practice expressly authorizes a summary remedy on a bond given in an action at law, a federal court sitting in the state as a court of law adopts such practice, pursuant to the conformity act; *Hiriart v. Ballon,* 9 Peters 156, *Smith v. Gaines,* 93 U. S., 341 (both adopting the Louisiana statute); *Beall v. New Mexico,* 16 Wall 535, and *Moore v. Huntington,* 17 Wall, 417 (both adopting the New Mexico statute).

In *Hatch vs. Dorr,* 4 McLean, 112 which is another of the cases cited in *Arnold vs. Frost* as authority for its ruling, there was involved a judgment-creditor's bill between the same parties to enforce a judgment, and it was held that a mere change of residence after the judgment had been secured, did not oust the jurisdiction,

as the suit was not an original suit. The Court defined an original suit as follows: "Original bills are those which relate to some matter not before litigated in the Court by the same persons standing in the same interests." It will be observed that in the case at bar, this *supersedeas* bond has never been litigated, nor was the surety who is sued upon it before the Court in any other suit, until brought in by original process in the present action, which is an ordinary action upon a sealed instrument. From an examination of all the authorities cited in support of *Arnold vs. Frost,* it would appear either that summary process by writ of inquiry, based upon state practice was involved, as in the case of *Bobyshall vs. Oppenheimer,* 4 Washington, C. C., 482; or that there was in question a marshal's bond, as in the case of *Gwin vs. Breedlove,* 2 Howard 29; or an equity suit to restrain proceedings at law in the same Court, as in *Dunn vs. Clarke,* 8 Peters, 1. In the latter case, the Court made an important distinction, holding a bill for an injunction against the enforcement of a judgment rendered in a federal court to be ancillary as between the same parties but original as to new parties, and that as to the latter the jurisdiction depended on citizenship. Of the other cases cited by District Judge Hazel in passing upon the case at bar, *Egan vs. Chicago Great Western R. Co.,* 163 Fed., 344, was a case of summary proceedings based upon a state statute, and *Files vs. Davis,* 118 Fed., 465, was a case of an attachment bond, and one in which a distinct federal question was presented (see p. 470).

It would appear therefore, that the *Seymour* case, which was followed by the case of *Crane vs. Buckley* was based upon reasoning which has been repudiated by this Court, and that in the case of *Arnold vs. Frost* the adjudication proceeded upon the theory that because the bond had been given in the course of a proceeding

in a federal court, that such court was the logical tribunal to enforce the bond, and that the proceedings to enforce such a bond were to be treated as merely ancillary to the action in which the bond was given. This line of reasoning has also been repudiated by this Court. If an action on a bond given on appeal from a judgment is to be regarded as purely ancillary to the action in which the judgment below was rendered, what must be said of a proceeding to enforce the judgment itself? This Court has held that if the proceeding to enforce the judgment takes the form of an action on the judgment, it is an independent proceeding, and one in which the federal court must acquire its jurisdiction upon the ground of diverse citizenship, unless some distinct question is presented as to the construction of or validity of the Constitution or a law of the United States. In the three cases which we cite in this connection, the argument was made that diverse citizenship was unimportant because the actions were founded upon judgments of United States Courts. The three cases are, *Provident Savings Society vs. Ford,* 114 U. S., 635; *Metcalf vs. Watertown,* 128 U. S., 586; and *Carson vs. Dunham,* 121 U. S., 421. In the *Metcalf* case the Court per Mr. Justice Harlan, said (128 U. S. at p. 588):

"• • Nor can the jurisdiction of the circuit court be maintained upon the theory that the suit is one arising under the Constitution or laws of the United States. The fact that it was brought to recover the amount of a judgment of a court of the United States does not, of itself make it a suit of that character; for the plaintiff, without raising by his complaint any distinct question of a federal nature, and without indicating, by proper averment, how the determination of any question of that character is involved in the case, seeks to enforce an ordinary right of property by suing upon the judgment merely as a security of record, showing a debt due from the city of Watertown. *Provident Sav. L. Assur. Soc. v. Ford,* 114 U. S. 635, 641. • • • "

Again, in *Carson v. Dunham,* 121 U. S. at p. 429, the court, per Mr. Chief Justice Waite, said with respect to a defense based upon a decree of a federal court:

"* * * It is an attempt to enforce an ordinary property right, acquired under the authority of judgments and decrees in the courts of the United States, without presenting any question 'distinctly involving the laws of the United States.' "

And he goes on to say that the proper method of bringing the case into the federal jurisdiction, in the event that the defendant be deprived of any right under the authority of the United States court judgment would be to take the case to the Supreme Court on writ of error, after it had gone to the highest state court, as provided by Section 709 of the United States Revised Statutes.

Remedies upon Injunction and other Equity Bonds Distinguished

It was decided by this Court in the case of *Russell v. Farley,* 105 United States, 433, that the enforcement of an injunction bond by ancillary proceedings, is based upon the chancery practice which governs the practice of the federal equity courts. It must be quite clear that there is little if any, similarity between a bond the amount of which, the giving of which, and the enforcement of which, is within the judicial discretion of the Chancellor as an incident to interlocutory or final relief, and frequently the price paid for the relief, and a statutory appeal bond which is a matter of right, a complete remedy upon which is afforded by both the state and federal law courts within their respective jurisdictions over the parties. Aside from the statutes and practice which prevail in some states, allowing summary remedies upon all bonds and certainly in the State of New York where no such summary jurisdiction

exists, this distinction has been clearly recognized. In the only reported case in New York, and that case not officially reported, *Cambreling vs. Purton,* 16 New York Supplement 49, the general term of the New York Supreme Court in the first department held that an appeal bond could not be enforced by a summary remedy in the action in which the bond was given, but that a new independent and plenary action at law must be brought upon it; and in the case of *Waysman vs. Updegraff,* 1 Kansas 516, the court held expressly that while the liability of a surety upon an injunction bond was properly enforced by a summary remedy that a similar proceeding should be refused as against the surety upon an appeal bond given in the same case. Unquestionably a common law action is, in the absence of statute, the only remedy upon an appeal bond. *Miller vs. Hogeboom,* 56 Neb., 434; *Hadley vs. Bernero,* 97 Mo. App., 314 *Willard vs. Fralick,* 31 Mich. 431; *Stephens vs. Miller,* 80 Ky. 47. In the courts of New York State, an original common law action is the only remedy upon an appeal bond, and if the United States R. S. Section 914 justifies a departure from the common law rule in those states which have changed the common law, it would seem that it should be at least strongly persuasive of the propriety of conforming to the New York common law practice with respect to all appeal bonds, including *supersedeas* bonds given under the federal statute. Even in cases arising in the equity branch of the federal court, there has been a limit to the extent to which the federal courts have been willing to stretch the doctrine of ancillary jurisdiction. For instance, in the case of *Kirker vs. Owings,* 98 Fed. 499, 508-9, it was held that in the absence of statute, court rule or express stipulation, in the bond of a receiver, the obligation of the bond could only be enforced against the surety by an action in a court of law. And in this connection it is interesting to note that this court has

held that the mere fact of the appointment of a receiver by order of a court of the United States, does not create a federal question, or give the receiver the right to take a suit against him into the federal jurisdiction, even by writ of error to this Court from the state court, so long as the litigation does not directly draw in question the validity of his authority as an officer of a federal court. See *Bausman vs. Dixon,* 173 U. S. 113; *Gableman vs. Peoria Ry. Co.,* 179 U. S., 335.

THE CASE OF TULLOCK VS. MULVANE.

This case is relied upon by our adversaries. An examination of it discloses that it is really an authority in our favor.

In *Tullock vs. Mulvane,* 184 U. S., 497, the majority of this Court found that a federal question actually arose. The action was brought in a State Court of Kansas upon an injunction bond given in a Federal Court. It came here upon writ of error to the highest State Court. The question in dispute was whether attorneys' fees could be recovered as part of the damages under the bond. This question necessarily involved the scope, effect and meaning of the bond. The Supreme Court of Kansas had held, contrary to the rulings of the Federal Courts in similar cases, that attorneys' fees were part of the damages accruing under the bond; and by such ruling this Court held that the defendant had been deprived of immunity under the federal law from such liability. As to certain propositions pointed out in the minority opinion, there was no disagreement between the members of this Court; these were: (see p. 516) that the action on the bond, which was an ordinary action at law, could not be considered a mere incident to the injunction proceeeding, nor could it be regarded as auxiliary to the proceeding in the Federal Court; and that the action had been properly brought in the state court and

could have been brought in no other. It is not suggested in the majority opinion nor anywhere in the case that a federal question arose simply because the bond was given in a Federal Court; but it was pointed out that the federal question arose *because the parties took opposing views as to the scope and effect of the bond.* If the *Tullock* case had come up from a Federal Court on a certificate showing, as ours does, that the action was between citizens of the same state,

"and that no question was raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given" (Judge Hazel's Certificate, p. 9, f. 18.)

it cannot be doubted that this Court would have unanimously decided against the federal jurisdiction. If, as our adversaries claim, in the case at bar, all argument is foreclosed by the mere suggestion that the suit is brought on a bond given in a Federal Court, we hardly think that the members of this Court would have disagreed in the *Tullock* case, or that they would have devoted over twenty pages of the official report to discussing when, in a suit upon such a bond, a federal question arises, and when it does not.

Both in the *Tullock* case, and in *Mo. etc., R. R. Co., v. Elliott,* 184 U. S., 530, this Court was asked to determine the *scope and effect* of bonds given in federal courts. It is to be noted that both of these cases orginated in state courts, and came here on writs of error after passing through the highest courts of the states.

Other Bond Cases Distinguished

There are some other cases in which it would appear that federal courts have entertained actions on bonds irrespective of diversity of citizenship, but these have

all been cases such as suits on contractors' bonds and bonds given by marshals and clerks of the United States Courts, where the bonds ran to the United States. Whatever doubt might have been previously entertained as to the proper theory upon which the suits were maintainable, has been dispelled by the decision of this Court (*U. S. Fidelity Co. vs. Kenyon*, 204 U. S., 349) in which the Court expressly held that the correct basis of decision was that although the suit might be brought by a private individual in the name of the United States, that the United States had a real interest in the obligation of the bond being fulfilled, and in most of the cases of this character, it will be found upon examination that either the statute which authorized the giving of the bond expressly conferred a right to sue upon it in the federal court, or that the suit involved a question as to the scope or construction of the statute under which the bond was given.

THE DOCTRINE OF ANCILLARY JURISDICTION CANNOT BE INVOKED IN THIS CASE.

As it was held by McDonald, J., in *Conwell v. White Water Valley Canal Co.*, 4 Bissell, 195, federal courts will entertain ancillary proceedings to enforce rights claimed by or against parties to the original litigation adversely to parties thereto or to other persons, (in the absense of diversity of citizenship between the parties to the ancillary controversy) only "* * * If no state court has power to guard and determine those rights and interests without a conflict of authority with the national court;" in such cases, "the latter court will, *from the necessity of the case*, and to prevent a failure of justice, give such third persons a hearing irrespective of their citizenship. * * *" Our case is not one in which the state court has no power to guard and determine the rights of the plaintiff below; it may just as

readily do so by entertaining an action on the supersedeas bond as it could by entertaining an action on the judgment against Whitcomb which was rendered in the United States District Court.

State courts have frequently sustained actions upon bonds given in federal courts. *Wood v. Coman,* 56 Ala. 283. *Saunders v. Taylor,* 6 Mart. (N. S.)519. *Aiken v. Leathers,* 37 La. Ann., 482. *Braitwait v. Jordan,* 5 N. D. 196. *Mont. Min. Co. v. St. Louis Min. Co.,* 19 Mont. 322 *Rhodes v Ashurst,* 176 Ill. 351. *U. S. v. Douglas,* 113 N. C. 190.

That a common law action upon an appeal or supersedeas bond given in one court may be maintained in another is well settled. *Gallagher v. Flannelly,* 22 Wend., 614, *Curtice v. Bothamly,* 90 Mass., 336 *Commonwealth v. Gould,* 48 Pa. Super. Ct. 528-534; although it was pointed out in the above cases that an ancillary remedy, such as a *scire facias,* would have to be brought in the same court as that in which the bond was given.

Equity will assume jurisdiction either to stay or aid an action at law, to give validity to defenses in a pending action at law, etc., and in these cases, bills although commenced by original process, if between the same parties and involving the same interests, may be ancillary to actions at law; but it is respectfully submitted that unless the case of *Arnold vs. Frost* should be held to establish a new extension of the meaning of word ancillary, that no case can be found where one original independent action at law has been held to be ancillary to another.

Suppose the sole defense of a surety upon a bond given in a federal court should take the form of a plea of payment, or in the case of an individual surety, a plea of infancy, upon which issue is joined by the plaintiff. Could it be held that the issue arising upon such a plea involves a federal question, merely because the bond was given in

a federal court? Would not the surety be entitled to a common law jury trial upon either of the issues here suggested? And how could such a jury trial in one common law action be considered as ancillary to the proceedings in a prior common law action between different parties, which had already ended in judgment?

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT SHOULD BE REVERSED, WITH DIRECTIONS TO THE LEARNED COURT BELOW TO DISMISS THE CASE BECAUSE OF ITS LACK OF JURISDICTION THEREOF.

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IN THE

United States Supreme Court

OCTOBER TERM, 1914.

No. 643

AMERICAN SURETY COMPANY OF NEW YORK
Plaintiff in Error
(Defendant below)

against

GEORGE S. SHULTZ
Defendant in Error
(Plaintiff below)

(IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK)

Brief of Plaintiff in Error in Opposition to Motions to Affirm or Transfer to Summary Docket

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Supreme Court of United States

American Surety Company of New York, Plaintiff in Error, against George S. Shultz, Defendant in Error.	October Term, 1914 No. 643

Brief in Opposition to Motion to Affirm or Transfer to Summary Docket

This case comes before this Court upon a writ of error to the District Court of the United States for the Southern District of New York, and a certificate of the latter Court showing that the sole question before it was one concerning its jurisdiction.

Statement of Facts

The motion is to affirm and allow 10 per cent. damages on the ground (Brief of Defendant in Error, p. 11):

"It is obvious that the demurrer was interposed solely for the purpose of delay and to prevent the collection of the judgment obtained by the defendant in error against Whitcomb after a full and fair trial before a jury, and after all the contentions available to him and raised by his counsel had been passed upon adversely by the Circuit Court of Appeals and the judgment in favor of the defendant in error affirmed."

In view of the mass of extraneous matter contained in the brief in support of these motions a statement of the salient facts concerned in this litigation becomes necessary. The Robertson Sales Company, a corporation, sold chewing gum to persons who rented from it automatic vending devices. These latter were in turn sup-

plied it by one Plumb, a well known and experienced manufacturer of clockwork machines, whose machines worked satisfactorily. The Great American Automatic Vending Machine Company, a New Jersey corporation, sought this business, and represented that it was specially equipped with machinery and expert and experienced workmen to turn out a large order and make deliveries more rapidly than Plumb could. As a result of these representations the Sales Company entered into a contract for $46,000, worth of the machines and one James A. Whitcomb, a friend and backer of the Sales corporation, in consideration of one dollar, bound himself by a separate contract of suretyship to the faithful performance by the Sales Company of its part of the contract.

The principal contract read simply that the Machine Company agreed to manufacture according to model (the model being one of the Plumb machines). It was *absolutely silent* as to whether the making of the machines might or might not be farmed out and the parts simply assembled in the Machine Company's shop. That is to say, the antecedent representations were not expressly reiterated in the written contract as warranties, the contract merely providing that the Machine Company agreed to manufacture the machines. (The contract is printed as Appendix 1 of this brief.)

The machines delivered by the Machine Company would not work, the Sales Company's business was therefore being ruined, and it refused to accept further deliveries. After a lapse of time the Machine Company went out of business, and made an assignment of its claims to one Shultz, the defendant in error here. Shultz sued the surety, Whitcomb, who, having learned in the meantime, that the Machine Company had never manufactured clockwork machines, had no machinery for that purpose and no skilled and experienced workmen, and in addition had never from the beginning, even at the time the representations were made, intended to manu-

facture in its own shop, attempted to defend on this ground, as well as on the ground that the machines had proved worthless. Judge Mack at the instance of the defendant in error, the then plaintiff, *excluded all evidence* as to the representations made to the surety, as amounting to fraud in the inducement and not admissible as a defense on *the law side* of the Court. The Court thereupon instructed the jury that it was unimportant that the machines would not work, as the contract only required them to conform to model and, to use Judge Mack's own words:

"I find nothing *in this contract* to justify a claim that the Machine Company itself had to manufacture all of the parts and all dies, patterns and special tools personally and had to manufacture all these dies, patterns and special tools, for each and every distinct part (fol. 1780)."

(The above is quoted from Judge Mack's instruction to the jury incorporated in Judge Hand's opinion printed at page 17 of brief in support of motion.) The jury returned a verdict for Shultz for about $25,000, being made up of anticipated profits and material claimed to have been bought to be furnished the sub-contractors and for labor of assembling certain machines, etc. Whitcomb appealed to the Circuit Court of Appeals and assigned as error, *inter alia,* that his principal defense of the fraud practiced upon him had been excluded. The defendant in error, by the same counsel who present this motion in his behalf, argued that no error had been committed in this regard, for the reason, as stated in their brief:

"The distinction between relief at law and in equity is clearly marked in the Federal Courts and an equitable defense may not be proved in an action at law, but relief must be sought by an appropriate action in equity. *Burns vs. Scott,* 117 U. S., 582; *Thompson vs Railroad Company,* 73 U. S., 134; *Lewis vs. Cocks,* 90 U. S., 466; *Oelrichs vs. Spain,* 82 U. S., 211; *Lindsay vs. Bank,* 156 U. S., 485."

* * * * *

"Such a defense, within the rule stated, clearly was an equitable defense not cognizable in a Court of Law. On

this ground alone the exclusion of the evidence and the refusals to charge complained of clearly were proper."

(verbatim extracts from brief submitted on behalf of George S. Shultz in the Circuit Court of Appeals upon the hearing of the writ of error from the judgment at law.)

No reference occurs in the opinion of the Circuit Court of Appeals to Whitcomb's defense covered by this assignment of error. (See brief in support of motion p. 13.) It obviously adopted the view supported by the decisions relied upon by Shultz.

Whitcomb having been, at the instance of Shultz, remitted to the Equity Court for relief from the fraud practiced upon him and which had cost him $25,000, filed his bill on the Equity side to have the contract of suretyship cancelled and the collection of the judgment enjoined. The motion for an injunction *pendente lite* came up before District Judge Hand, who took the extraordinary position that Judge Mack having held, in the law case, that the principal contract did not in terms require the machines to be manufactured in the manner and under the conditions represented to the surety, the falsity of the representations became immaterial, and that Judge Mack's interpretation of the contract was a *res adjudicata.*

The temporary injunction having been denied upon grounds which disposed of the bill itself, Shultz brought his action against the plaintiff in error here, the American Surety Company; and the real object of the present motion is to get the $25,000, into Shultz' hands before the Circuit Court of Appeals can review Judge Hand's decision. The dismissal of the bill was by Judge Lacombe, who simply followed Judge Hand's opinion. The temporary injunction having been refused, and Shultz being a dummy assignee, his assignor being of no financial responsibility, Whitcomb at once appealed from the dismissal. We expect to argue said appeal at the November session of the Circuit Court of Appeals.

Statement of Facts

Inasmuch as Judge Hand's opinion is printed as an exhibit in the moving brief, we have taken the liberty of reprinting here our analysis of his decision (appendix II) as the same appears in our brief already printed for use in the United States Circuit Court of Appeals. If that Court should fail to approve of a surety, who had been tricked and defrauded, being made the shuttelcock between the law and equity sides of the District Court, denied a hearing in one because he ought to be in the other, and denied a hearing in the latter because he has already been heard in the former; the relief granted by it will be a mockery if, as a result of this motion, the money is collected by Shultz and beyond the reach of possible recovery.

It is also moved to summarily affirm on the ground that the question certified is frivolous. As color for that motion the brief filed in support contains the statement (Brief p. 7) that District Judge Hazel in giving judgment below, did so on the ground:

"as appears by his memorandum of opinion, that the District Court clearly had jurisdiction, and that the demurrer was wholly frivolous and without merit."

By reference to the memorandum in question (Rec. p. 7, f. 13) the latter portion of this statement is found to be wholly without foundation in fact. What really occurred was that District Judge Hazel being asked to base his decision in part at least on that ground distinctly and in terms refused to do so.

The Question Certified

After showing how the question arises, the certificate of the District Court states it as follows:

"Has the District Court of the United States for the Southern District of New York jurisdiction of a plenary action at law commenced by original process by a citizen of the State of New York against a corporation or-

ganized under the laws of said State to recover the sum of $25,106.50 exclusive of interest and costs upon a bond or undertaking executed by said corporation as surety and filed in the office of the Clerk of said Court for the purpose of procuring a *supersedeas* and stay of execution upon a writ of error to a judgment rendered in said Court in favor of the obligee and against the party who executed said bond as principal, which judgment so superseded and stayed had been entered in a plenary action at law brought by said obligee against said principal in the Supreme Court of the State of New York and by said principal removed to said United States Court for the Southern District of New York; (the said surety not being a party to said action). It appearing that no question is raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given?" (Record, p. 9, fols. 17-18).

The Errors Assigned

These are (Record p. 10, f. 19) that the Court erred: (1) in holding that it had jurisdiction; (2) in overruling the demurrer to the complaint; (3) in granting the order for judgment; (4) in entering judgment in favor of the plaintiff for the sum of $26,972.68; and (5) in rendering judgment against the defendant below for any sum whatsoever.

The Law of the Case

The earliest of the cases at all in point upon this jurisdictional question, and the one cited and relied upon in *Crane vs. Buckley,* 105 Fed. Rep., 401, which in turn was relied upon by the learned District Judge in deciding this case below, was the case of *Seymour vs. Phillips Company,* 7 Biss., 460. In that case it was squarely decided that an action on a *supersedeas* bond begun by original process in the United States Court, was maintainable without reference to diverse citizenship or other special ground of jurisdiction as a case "arising under

a law of the United States." In deciding that case, the learned Judge who rendered the opinion stated that it was a new question. The decision was based upon two grounds, one of convenience; and the other that it was proper that the Federal Court should entertain an action upon a *supersedeas* bond given under the federal statute for the reason that questions were *likely* to arise as to the meaning of the bond, its scope and the construction, scope and validity of the federal statute under which it was given. The entire argument upon which this decision rests has been disposed of by two recent adjudications of this Court, in which the opinions were delivered by Mr. Justice Van Devanter, defining clearly what is meant by "a case arising under a law of the United States." The first of these cases is that of *Shulthis vs. McDougal,* 225 U. S., page 561, in which (at page 569) the following language is used: "A suit to enforce a right which takes its origin in the laws of the United States, is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Again, in *Taylor vs. Anderson,* 234 U. S., 74, the Court in reaffirming this view as to what constitutes a case arising under a law of the United States, further decided that it is quite immaterial that there may arise or even that there is *likely* to arise in a suit which has its origin in a federal statute, some question concerning the scope and validity of the statute, unless the existence of such a question appears affirmatively from the necessary allegations of the plaintiff's pleading. In that very case the plaintiff sought to inject a federal question by anticipating in his pleading a defense against his claim which was founded upon a federal statute. The proper proceeding to raise such a question in this Court was pointed out by the District Judge in the case of *Taylor vs. Anderson,* 197 Fed. Rep., at p. 388, which was to wait

until the construction or validity was drawn in question in the State Court, and then take the case to this Court on appeal from the highest State Court. From the foregoing, it would appear that the ground of decision of the leading case in point in the federal reports upon this question, has been invalidated by the decisions of this Court just referred to.

The principal case relied upon by the learned District Judge below, in disposing of this jurisdictional question, was the case of *Arnold vs. Frost,* 9 Ben., 267. In that case another suggested ground was discovered and announced, to wit: that an action to enforce a *supersedeas* bond is in the nature of an ancillary proceeding. *Arnold vs. Frost* cited as authority for this ground of decision, the case of *Jones vs. Andrews,* decided by this Court, 10 Wallace, 327. That was a case where a garnishment proceeding having been instituted in the Circuit Court, a bill filed in the same Court to enjoin those proceedings, was held to be not an original suit, but a defensive or supplementary suit, and one therefore that might be maintained irrespective of the diverse citizenship of the parties. The distinction between an original suit and an ancillary one is both ancient and well-established, and it is conceded that if a *supersedeas* bond is made the basis of purely ancillary proceedings in a Federal Court, that the diversity of citizenship becomes unimportant. For instance, in the case of *Reilly vs. Golding,* 10 Wallace, 56, the facts were that a forthcoming bond had been given on an attachment, and a rule to show cause was issued in the original suit against the sureties on that bond, as was permitted by the State practice under a statute of Louisiana; that practice having been adopted by the United States Circuit Court, it was held that the proceeding there was merely incidental to the principal suit. In *Hatch vs. Dorr,* 4 McLean, 112, which is another of the cases cited in the case of *Arnold vs. Frost* as authority for its ruling, there was involved a judgment-creditor's bill between the same parties to en-

force a judgment, and it was held that a mere change of residence after the judgment had been secured, did not oust the jurisdiction, as the suit was not an original suit. The Court defined an original suit as follows: "Original bills are those which relate to some matter not before litigated in the Court by the same persons standing in the same interests." It will be observed that in the case at bar, this *supersedeas* bond has never been litigated, nor was the surety who was sued upon it before the Court in any suit, until brought in by original process in the present action, which is an ordinary action upon a sealed instrument. From an examination of all the authorities citied in support of *Arnold vs. Frost,* it would appear either that summary process by writ of inquiry, based upon state practice, was involved, as in the case of *Bobbyshall vs. Oppenheimer,* 4 Washington, C. C., 482; or that there was in question a marshal's bond, as in the case of *Gwin vs. Breedlove,* 2 Howard 29; or an equity suit to restrain proceedings at law in the same Court, as in *Dunn vs. Clarke,* 8 Peters, 1. In the latter case, the Court made an important distinction, holding a bill for an injunction against the enforcement of a judgment rendered in the Federal Court to be ancillary as between the same parties but original as to new parties, and that as to the latter, the jurisdiction depended on citizenship. Of the other cases cited by District Judge Hazel in passing upon the case at bar, *Egan vs. Chicago Great Western R. Co.,* 163 Fed., 344, was a case of summary proceedings based upon a state statute, and *Files vs. Davis,* 118 Fed., 465, was a case of an attachment bond and one in which a distinct federal question was presented (see p. 470).

It would appear therefore, that the *Seymour* case, which was followed by the case of *Crane vs. Buckley* was based upon reasoning which has been repudiated by this Court, and that in the case of *Arnold vs. Frost* the adjudication proceeded upon the theory that because the bond had been given in the course of a proceeding in

the Federal Court, that the Federal Court was the logical tribunal to enforce the bond, and that the proceedings to enforce such a bond were to be treated as merely ancillary to the action in which the bond was given. This line of reasoning has also been repudiated by this Court. If an action on a bond given on appeal from a judgment is to be regarded as purely ancillary to the action in which the judgment below was rendered, what must be said of a proceeding to enforce the judgment itself? This Court has held that if the proceeding to enforce the judgment takes the form of an action on the judgment, it is an independent proceeding, and one in which the Federal Court must acquire its jurisdiction upon the ground of diverse citizenship, unless some distinct question is presented as to the construction of or validity of the Constitution or a law of the United States. In the three cases which we cite in this connection, the argument was made that diverse citizenship was unimportant because the actions were founded upon judgments of United States Courts. The three cases are, *Provident Savings Society vs. Ford,* 114 U. S., 635; *Metcalf vs. Watertown,* 128 U. S., 586; and *Carson vs. Dunham,* 121 U. S., 421. What, after all is the test as to whether an action is ancillary or original? Does it depend upon the fact of some historical connection with some other proceeding, or is the fact that other parties and different interests are involved the crucial test? This Court answered that question in the case of *Dunn vs. Clark, (supra.)* There the same bill was held to be ancillary in so far as it sought to enjoin the collection of a judgment rendered in the Federal Court as between the original parties to that litigation and original with respect to new parties who had been made co-defendants. In the case at bar, it might perhaps be contended that had this action on the bond been brought against Whitcomb, it would have been in the nature of an ancillary proceeding in spite of the fact that it was in form an original action. But to go further and hold that one action at law against B, is

ancillary to another action at law against A, is to lose sight entirely of what is meant by the word ancillary in this connection. Equity will assume jurisdiction either to stay or aid an action at law, to give validity to defenses which can be used in a pending action at law, etc., and in these cases, bills although commenced by original process, if between the same parties and involving the same interests, have been held to be ancillary to actions at law; but it is respectfully submitted that unless the case of *Arnold vs. Frost* should be held to establish a new extension of the meaning of the word ancillary, that no case can be found where one original independent action at law has been held to be ancillary to another. There are some other cases in which it would appear that Federal Courts have entertained actions on bonds irrespective of diversity of citizenship, but these have all been cases such as suits on contractors' bonds and bonds given by marshals and clerks of the United States Courts, where the bonds ran to the United States. Whatever doubt might have been previously entertained as to the proper theory upon which the suits were maintainable, has been dispelled by the decision of this Court (*U. S. Fidelity Co. vs. Kenyon,* 204 U. S., 349) in which the Court expressly held that the correct basis of decision was that although the suit might be brought by a private individual in the name of the United States, that the United States had a real interest in the obligation of the bond being fulfilled; and in most of the cases of this character, it will be found upon examination that either the statute which authorized the giving of the bond expressly conferred a right to sue upon it in the Federal Court, or that the suit involved a question as to the scope or construction of the statute under which the bond was given.

Suppose the sole defense of a surety upon a bond given in a Federal Court should take the form of a plea payment, or in the case of an individual surety, a plea

of infancy, upon which issue is joined by the plaintiff. Could it be held that the issue arising upon such a plea involves a federal question, merely because the bond was given in a Federal Court?

Would not the surety be entitled to a common law jury trial upon either of the issues here suggested? And how could such a jury trial in one common law action be considered as ancillary to the proceedings in a prior common law action between different parties, which had already ended in judgment?

In *Tullock vs. Mulvane,* 184 U. S., 497, the only case in this Court cited by our adversaries, the majority of the Court found that a federal question actually arose. The action was brought in a State Court of Kansas upon an injunction bond given in a Federal Court. It came here upon writ of error to the highest State Court. The question in dispute was whether attorneys' fees could be recovered as part of the damages under the bond. This question necessarily involved the scope, effect and meaning of the bond. The Supreme Court of Kansas had beld, contrary to the rulings of the Federal Courts in similar cases, that attorneys' fees were part of the damages accruing under the bond; and by such ruling this Court held that the defendant had been deprived of immunity under the federal law from such liability. As to certain propositions pointed out in the minority opinion, there was no disagreement between the members of this Court; there were: (see p. 516) that the action on the bond which was an ordinary action at law, could not be considered a mere incident to the injunction proceeding, nor could it be regarded as auxiliary to the proceeding in the Federal Court; and that the action had been properly brought in the State Court and could have been brought in no other. It is not suggested in the majority opinion nor anywhere in the case that a federal question arose simply because the bond was given in a Federal Court; but it was pointed out that the federal question arose *because the parties took opposing views as*

to the scope and effect of the bond. If the *Tullock* case had come up from a Federal Court on a certificate showing, as ours does, that the action was between citizens of the same state,

"and that no question was raised by either party as to the validity or meaning of the bond or undertaking or of the statute or rule of Court pursuant to which the same was given." (Judge Hazel's Certificate, p. 9, f. 18.)

it cannot be doubted that this Court would have unanimously decided against the federal jurisdiction. If, as our adversaries claim, in the case at bar, all argument is foreclosed by the mere suggestion that the suit is brought on a bond given in a Federal Court, we hardly think that the members of this Court would have disagreed in the *Tullock* case, or that they would have devoted over twenty pages of the official report to discussing when, in a suit upon such a bond, a federal question arises, and when it does not.

It is respectfully submitted that the motions should be denied.

HENRY C. WILLCOX,
Attorney for Plaintiff-in-Error.

Charles F. Carusi,
Walter B. Grant,
Joseph M. Gazzam,
Of Counsel.

Appendix I

(A)

[Contract between Robertson Sales Co. and Great American Automatic Vending Machine Co.]

THIS AGREEMENT made this third day of December, 1908, between Robertson Sales Company, a corporation of the State of New Jersey, having its principal office at 164 Market Street, in the City of Newark, County of

Essex, State of New Jersey, party of the first part, and The Great American Automatic Vending Machine Company, a corporation of the State of New Jersey, having its principal office at 1041 Clinton Street, in the City of Hoboken, County of Hudson, State of New Jersey, party of the second part,

WHEREAS, the party of the first part desires that the party of the second part shall manufacture for them Ten Thousand (10,000) Vending Machines under the patents pending of the party of the first part, including all dies, patterns, special tools, etc., necessary for the manufacture of said Vending Machines, for the sum of Forty-six Thousand ($46,000) Dollars.

Now therefore, THIS AGREEMENT WITNESSETH

That for and in consideration of the payments to be hereinafter made by the party of the first part and covenants entered into by the party of the first part, the party of the second part does hereby agree to manufacture for the party of the first part Ten Thousand (10,000) Vending Machines like to the model deposited by the party of the first part with the party of the second part, on which patents are pending as aforesaid (except such alterations as have been agreed upon as set forth below) and all of the dies, patterns and special tools necessary for the purpose of manufacturing to be completed as follows:

Twenty (20) machines to be completed by the said party of the second part on the fifteenth day of February, 1909, or sooner if possible, and twenty (20) machines for each working day (excepting Sundays and Holidays) thereafter, until the total number of Ten Thousand (10,000), are constructed.

And it is further agreed that the alterations referred to in the preceding paragraph shall be

I. The opening at the bottom of the machines where goods are delivered is to be enlarged as much as is mechanically permissible to allow goods to lie more flat after dropping from the magazine.

II. The inside surface of the two side plates (known as such) are to be polished nickel instead of the dull finish.

III. The spreaders and holding shafts for the two side plates are to be held by screws instead of being riveted.

IV. The governor brake is to be of steel instead of the material now used.

And it is further agreed that each ten machines are to be packed in a case with partitions, with paper, excelsior, or other suitable packing around the machines so as to insure a reasonably safe package, which filled cases the party of the second part agrees to deliver f. o. b. freight cars or Express Company in Hoboken, N. J., at the direction of the party of the first part, taking receipt therefor and in the event of shipment by freight, to procure two copies of said receipt or bill of lading, one to be forwarded to consignee in a stamped envelope, to be furnished by the party of the first part, the other to be forwarded to the party of the first part with invoice.

And it is further agreed that the party of the second part will number all machines with a serial number prefixed by the letter "A," beginning with number "I," and will state on each invoice the numbers of the machines covered by said invoice.

And it is further agreed that the party of the second part guarantees first-class material and workmanship and any machines defective from the above causes may be returned to the party of the second part to be replaced or rectified by them. All defects claimed, however, shall be reported to the party of the second part not later than five days after machine has been put in operation by the party of the first part or their agents.

The party of the first part agrees to pay to the party of the second part or its assigns, the aforesaid sum and for the manufacturing thereof as follows:

On the first working day of each week a sum equivalent to the amount of machines manufactured during the previous week at the rate of Four dollars and Sixty Cents

($4.60) per machine, until the whole amount is paid.

And it is further agreed between the parties hereto that in case strikes, lock-outs, fires, or ony unforseen circumstances, over which the party of the second part has no control, shall happen so as to interfere with the manufacture or turning out of the required number of machines, the said party of the second part may have sixty (60) days to comply with the terms of this contract.

And it is further agreed that the party of the second part will provide storage of said machines of the party of the first part, but not to exceed the product of thirty (30) days' manufacture.

And it is further agreed that in case the party of the first part desires more machines per day, equal to a double output, or up to forty (40) machines per day, than those provided for by the terms of this contract, the same will be manufactured by the party of the second part, provided the party of the first part gives the party of the second part twenty (20) working days' notice of such desire to increase the delivery, and providing less than Eight Thousand (8,000) machines have been completed, and that the party of the first part will pay for same on the same basis as hereinbefore provided, then in that case, the party of the second part will so manufacture and deliver said double output, or up to forty (40) machines per day.

And it is further agreed that when all of the machines are manufactured and paid for fully pursuant to this contract that all dies, patterns, etc., made for these machines by the party of the second part, shall be the property of the party of the first part.

And it is further agreed that in case of suspension of work on this contract for a period in excess of sixty (60) days as provided in this contract by the party of the second part, by reason of strikes, lock-outs, fire, or any other unforseen circumstances, then the dies, pat-

terns, and other special tools manufactured by the party of the second part, on this contract, shall be delivered to the party of the first part, upon payment to the party of the second part by the party of the first part of the sum equivalent to the pro rata cost of the dies, patterns, etc., on that portion of the number of machines on this contract which have not been completed, based on the pro rata cost per machine of said dies, patterns, etc.

And it is further agreed that upon completion of the making of the dies, patterns, tools, etc., the party of the second part will inform the party of the first part of the amount estimated as the cost of said dies, patterns, etc.

And it is further agreed that the dies, patterns, etc., made under this contract shall be kept in proper working order, so that at the completion of this contract, the same may be delivered to the party of the first part by the party of the second part, if the party of the first part so desires, in first-class condition, with such reasonable wear and tear as will be caused by the work done with them.

In Witness whereof the respective parties hereto, have respectively caused their seals to be affixed, signed by their respective presidents, and attested by their respective secretarys.

Attest: E. E. St. Germain,

GEORGE ROBERTSON, Prest.

(Corporate Seal of Robertson Sales Co.)

E. S. Gittens,

E. E. St. Germain, Temp. Sec'y.

Attest: The Great American Automatic Vending Machine Company.

E. E. BAUMANN, Prest.,

(Corporate Seal of Great Am. Auto. Vend. Mach. Co.)

O. Klug, Sec'y.

Appendix I (B)—Suretyship Contract

(B)

[Suretyship Contract]

In consideration of the sum of one dollar ($1) to me in hand paid by The Great American Automatic Vending Machine Company and in further consideration of the making of said contract, I do hereby promise and agree to and with them, that the within named Robertson Sales Company, party of the first part, will faithfully perform and fulfill everything in the foregoing agreement on its part and behalf to be performed and fulfilled at the time and in the manner in said contract provided, and I do hereby waive and dispense with any demand upon the said Robertson Sales Company, and any notice of non-performance on its part.

Witness my hand and seal this fourth day of December, 1908.

JAMES A. WHITCOMB, (L. S.)

Signed, sealed and delivered
in the presence of
E. E. St. Germain.

Appendix II

[Extract from brief of Whitcomb to be used in Circuit Court of Appeals on argument of appeal in equity suit to restrain collection of judgment on ground of fraud].

Argument

Stated briefly, this case presents the singularity that, by tossing the ball from one jurisdiction to another, Whitcomb is made the victim of a legal legerdemain whereby he is to be mulcted of $25,000, under a contract of suretyship which is voidable according to every settled principle of law and rule of decision. When sued in the law court, he is told that the fraud practiced upon him is of exclusively equitable jurisdiction; when he goes into

a Court of Equity he is told that the subject-matter of his complaint is *res adjudicata* in the law court.

Fraudulent representations are made to induce Whitcomb to enter into a separate written contract of suretyship. The principal contract is absolutely silent as to the matters covered by these false statements so that in no sense are the parol representations *waived* or *modified* by the written terms of either the principal contract or the contract of suretyship. We emphasize this statement and respectfully challenge a reading of these contracts with a view to discover one single word or clause which is inconsistent with or at variance with the statements set out in the bill of complaint. If, too on the one hand, the Court can find nothing in the contract *affirmatively requiring* the machines to be made as was orally represented to Whitcomb, they would be made, on the other hand, nothing can be found *affirmatively agreeing* to the farming out and subletting of the work, or indicating that such was the intention or privilege of the "Great American Automatic Vending Machine Company" or that it lacked the experience and facilities for doing the work.

Judge Hand saw an inconsistency between the oral statements made to the surety and the principal contract as "liberally interpreted" by Judge Mack in the action at law.

Judge Mack's liberal interpretation went no further than to hold that there was nothing upon the face of the written contract itself which *affirmatively required* the machines to be manufactured by the Company itself, and to that extent the "liberal interpretation" is an adjudication. It is unavailing now, in any event immaterial, that the adjudication in question would never have been made if evidence could have been admitted as to the representations which preceded the contract. The real point is that the interpretation was an adjudication of a negative fact and not of an affirmative character. The decision was that there was *nothing* in the

contract on the face of it to *prevent* farming out the work. We are compelled to admit that. It is *res adjudicata.* But to go further and take the position that a surety consents to everything not in express terms prohibited by the principal contract; and that an adjudication that a thing is not *prohibited* is an adjudication that the surety consents to it, is to announce a new and startling innovation in time honored legal principles. Under this theory no case can ever arise for the cancellation or rescission of a contract on the ground of fraud *in the inducement.* Oral representations as to collateral facts must either be included in the written contract as warranties or be held to have been waived.

Judge Hand in disposing of the motion for an injunction practically disposed of the entire case. His opinion that the bill should be dismissed is based upon two grounds, or rather upon a blending of two grounds, to wit:

1st. That the principal contract has been adjudicated to be inconsistent with the alleged antecedent misrepresentations.

2nd. That the surety was not injured by the Machine Company doing something that its contract permitted it to do.

Both of these bases of decision must stand or fall with the premises upon which they rest, and we therefore again ask the Court to lay the written contract and the allegations of the bill side by side and find, if it can, a word or syllable in the contract which is inconsistent with the allegations of the bill. If by the expression "If the contract *allowed* the Machine Company" is meant merely, what an inspection of the contract will disclose, that it was *silent* upon that point, and contained no express *interdiction,* the whole fabric of the opinion of Judge Hand must fall, as in conflict with absolutely settled principles of law; if, on the other hand, he means by the constant use of the word "allowed," that the contract was in terms, or was ever held by Judge Mack to be

in terms, inconsistent with the statements made to the surety and others, the opinion of the learned Judge is predicated upon non-facts.

We have no desire to juggle words or split hairs, but on the other hand when a meritorious defense is excluded on purely technical grounds in one branch of the Courts and is then refused to be heard in another more appropriate tribunal on the ground that the rankest fraud is excused because the contract "allowed" the fraud to be perpetrated, we have a right to know just what is meant by "allowed" so that we can look into the contract and see if the statement is correct. If the learned Judge below is right, his opinion could have been rendered in four words instead of four pages: *Volenti non fit injuria.*

The opinion filed by Judge Hand must stand or fall by the result of this test, and we are willing to hazard our rights to a reversal of the lower Court upon the outcome of such an analysis.

Judge Hand in his opinion, in the second paragraph thereof, himself states Judge Mack's interpretation of the contract as simply that it, "did not require the Machine Company to build the machines in their own shops."

"There is a very simple and conclusive answer to this reasoning, that is, that as the contract entered into *did not require* the Machine Company to build the machines in their shops, but only to deliver machines made like the model, the fact is quite immaterial that they could not have done them in their shops. It has now been finally and authoritatively adjudicated between the parties in the action at law, that the contract has the interpretation which I have just mentioned and that puts an end to the case. Fraud must touch some matter material to the action of the injured party; it must be a statement about facts whose truth would have kept the victim away from his injury" (Judge Hand's opinion—Italics ours).

We respectfully submit that the foregoing statement by the learned Judge amounts to the announcement of

the following legal principles, to wit; that one cannot be injured by the falsity of representations that a thing will be done in a particular manner and by a particular person, unless these representations are repeated in the subsequent written contract which the victim is induced to enter on the faith of the antecedent representations. That is not the law and never was the law. It may be true that the written contract "did not require the Machine Company to build the machines in their own shops," but it is a far cry from merely not requiring that a thing shall be done in a particular way, to hold that this is equivalent to a consent that it may be done in some other way. It is clear that if statements are made to a man to induce him to enter into a contract and he does enter into a contract, the expressed terms of which, or even the fair implications from which, are at variance with the previous parol representations, the former are undoubtedly merged into the latter. The parol evidence rule proceeds upon a somewhat similar basis, and gives effect to the terms of the written agreement rather than to parol statements, whether antecedent or contemporaneous, which are at variance with it. But Judge Hand's decision is the first instance known to counsel where a contract being silent with respect to statements made to induce its execution, it has been held that the failure to reiterate the statements, in the form of a requirement in the contract itself, would nullify the legal effect of the representations made; or in which it was decided that the defrauded party could not complain, if he had omitted to include in the contract a formal requirement that the antecedent statement should be made good. We quite agree with the statement in the opinion of the learned Court below, that the fraud must touch some matter material to the action of the injured party, but the action that is meant, is one that would have kept the victim away from his injury, and it is clear from the allegations of the bill that the false representations in this case were such that had they not been made Whit-

comb would have refused to become surety, and indeed the Robertson Sales Company would never have entered into the contract. It must not be overlooked, that the position of a surety entitles him to something more than ordinary business honesty, and the law is well settled that his contract is one *strictissimi juris,* and that even a trivial alteration in his contract, or the slightest misrepresentation to him, will avoid his contract. The cases are well settled upon this point, and some of them are cited at another point in this brief. The record disclosed that the Great American Automatic Vending Machine Company paid Whitcomb $1, as a consideration for his assuming a liability of $46,000.00. It would seem that he would at least be entitled that he should not have been lied to and deceived into assuming so large a responsibility. The motive which induced Whitcomb to assume this liability must not be confused with the consideration which moved to him from the Machine Company, and reference is only made to the fact that the consideration is purely nominal as illustrative of one of the reasons why a surety is entitled to be treated with upon a different plane than may exist between the principals.

Even at the risk of tiresome repetition, we call attention to other instances of what we conceive to be the illogic in the opinion of the learned Court below. For instance, constant reference to the contract "allowing" the Machine Company to manufacture anywhere. These references are invariably made the basis of the conclusion that if the written contract "allows" a thing to be done, a previous representation that it would not be done is nullified by the permission, consent or allowance to be found in the terms of the contract. Attention has already been called to the fact that in the beginning of the second paragraph of the opinion, the learned District Judge states Judge Mack's interpretation of the contract, as simply not in terms requiring the Machine Company to manufacture in its own shops, and again at the bottom of the second to last paragraph of the opinion he quotes the very language of Judge Mack, as follows:

"I find nothing in this contract to justify a claim that the Machine Company itself had to manufacture all of the parts and all dies, patterns and special tools personally, and had to manufacture all those dies, patterns and special tools, for each and every distinct part (fol. 1780)."

The above clause is cited below the statement that "because the contract was more liberally interpreted, and the same interpretation makes it quite impossible to urge that there was any fraud which justifies cancelling the contract." Again, in the third paragraph of his opinion, the learned Judge says, speaking of the assurances that the machines would be manufactured by the Machine Company itself, "such an assurance can hardly be the basis of any right when accompanied by a formal undertaking which imposes different obligations". We have already seen that the contract did not impose any different obligations. Curiously enough, the learned Judge has, by easy stages, proceeded from a contract which, in the first paragraph in the opinion, did not require a thing to be done to a contract in a latter part of the opinion which allowed that thing to be done and finally, to a contract which imposed an obligation that it should be done. Judge Mack's interpretation of the contract and that placed upon it by this Court, stopped at the first of these steps. Again it is said, "if these facts could constitute any such fraud, they would have been a good defense in the action at law, because they would have shown that the Machine Company had not substantially performed". That statement could only be true where the contract by its expressed terms required the goods to be manufactured in the Company's own shops, and as applied to a case like the present, does not correctly state the law. There would be no equity for the cancellation or rescission of a contract obtained by fraudulent representations, if there were an adequate remedy at law by way of claim of insufficient performance. As far as these representations might have been availed

of in the law Court, otherwise than as a bar to the action, it would have been as surrounding circumstances in the light of which a different construction might have been put upon the principal contract, and if Judge Mack's refusal to receive facts in evidence as a defense, was open to review, counsel would gladly urge upon this Court that instead of a "liberal interpretation" doing away with Whitcomb's defense. Whitcomb's defense would have done away with the "liberal interpretation". Can this Court, or could Judge Mack have possibly placed upon the contract with the Robertson Sales Company, the interpretation which was placed upon it, had it been read in the light of the antecedent representations which had been made to Whitcomb and to the officers of the Robertson Sales Company as to the equipment in men and machinery of the Machine Company, and of its purpose to use that equipment to assure the more speedy delivery of the machines than had been possible under the Plumb contract?

The vice in the reasoning of the learned Judge below, can be brought out clearly by an illustration. It is said that the jury found that the Machine Company's output conformed to the model and that it was therefore unimportant whether the machines were made by inexperienced workmen in other shops or were made according to the representations to Whitcomb that they would be made by experienced workmen in the Company's own shops, adequately equipped with machinery. Suppose one requiring a dangerous surgical operation is induced to undergo the same at the hands of a surgeon who is in fact a mere beginner in practice, but who falsely represents that he holds degrees from celebrated medical schools and that he has successfully performed one hundred similar operations. Upon the strength of this representation and before the operation is performed, the patient enters into a written agreement to pay one thousand dollars for the services of the surgeon, provided the patient gets well. Nothing more is included in

the written contract, which as will be seen, is quite silent as to the skill and experience of the surgeon, and therefore "allows" the operation by any kind of a licensed surgeon. The operation is performed and by luck the patient recovers. The surgeon sues upon the contract and the patient offers evidence of the misrepresentations. The Court refuses to hear such evidence on technical jurisdictional grounds and makes a "liberal interpretation" of the contract, under which the jury having found that an operation was performed, and that the patient is well, brings in a verdict against him. His real defense having been excluded by the law Court on the ground that it is cognizable only in equity, the plaintiff goes in equity and is told that if the contract "allowed" any kind of a surgeon whether skillful or not, to perform the operation, and as that was the interpretation which had been placed upon the contract by the Trial Justice, that it would be impossible to see how these representations could have been material. The operation was performed, and the patient is well. Of course, to that the patient might answer "I would not have promised to pay this man anything like one thousand dollars for the performance of the operation had I known he was a mere tyro; in fact had I known that, I would have preferred to take chances of getting well without an operation." That is just Whitcomb's position, that if he had known of the deceit and fraud which was being practiced upon him to induce him to stand sponsor for a forty-six thousand dollar contract of the Robertson Sales Company he would not have become surety, but would have left the Machine Company to decline the contract and the Robertson Sales Company to have gone on buying their machines from Plumb as theretofore. It will certainly be difficult to ever convince a man who has a judgment of twenty-five thousand dollars against him as surety, that he wasn't damaged by the fraudulent misrepresentations whereby he was induced to become surety.

Appendix II—Argument in Equity Appeal

Much capital was sought to be made on the argument in the Court below, that this appellant was not acting in good faith and was simply seeking to obstruct, on all sorts of frivolous pretexts, the collection of the judgment against him; that he had had one trial and now wanted another one, etc. These statements come with peculiarly ill grace, when applied to a defendant who is seeking to resist an original fraud and a subsequent dismissal of the right to substantiate in a court of law his allegations as to the fraud and deceit practiced upon him.

By reference to the appendix filed with this brief it appears that this Court on the appeal from the judgment at law overruled the assignment of error concerning the refusal of the Trial Court to allow Whitcomb to show the fraud practiced upon him, and that its action in that respect must have been influenced by the brief filed on behalf of the appellee, insisting that our sole relief for the fraud was in the Court of Equity. It is certainly fair comment to call the Court's attention to the fact that the appellee might well have sought rather than have evaded having a jury pass upon the allegations of bad faith and fraudulent conduct on the part of his assignor. When he succeeds in avoiding a decision upon the merits of this question in the law Court, through technical objections to the jurisdiction of the Court, it would seem that a Court of conscience would regard with peculiar disfavor the raising of other technical questions to prevent this issue from being tried in a court of equity, and thus to deprive Whitcomb of his day in Court upon a question which would determine his ultimate liability or nonliability in the large sum of $25,000.00.

Supreme Court of the United States

OCTOBER TERM, 1914

No. 643

AMERICAN SURETY COMPANY OF NEW YORK,

Plaintiff in Error,

against

GEORGE S. SHULTZ,

(In error to the District Court of the United States for the Southern District of New York.)

MOTIONS TO AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

KELLOGG & ROSE,

Attorneys for Defendant in Error.

Laplante & Dunklin Printing Co., 26 South William St., New York

In the Supreme Court of the United States

AMERICAN SURETY COMPANY OF NEW YORK, *Plaintiff in Error,* *against* GEORGE S. SHULTZ, *Defendant in Error.*	October Term 1914 No. 643

MOTION TO AFFIRM OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the above named Defendant in Error, by his attorneys of record herein, and moves this Honorable Court:

First: To affirm the judgment of the District Court of the United States for the Southern District of New York, at law, on the ground that it is manifest that this appeal was taken for delay only, and that the questions on which the decision of this cause depends are so frivolous as not to need further argument.

Second: If this Court should refuse to affirm, then to transfer this cause for hearing to the Summary Docket, because the cause is of such a character as not to justify extended argument.

KELLOGG & ROSE,
Attorneys of Record for Defendant in Error.

NOTICE OF MOTIONS.

To: AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiff in Error:

You Are Hereby Notified that the Defendant in Error in the above entitled cause will on Monday, the 16th day of

November, 1914, at the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of said Court the foregoing motions and each of them, and the brief in support thereof hereto annexed, all of which are now served upon you herewith.

Yours, etc.,

KELLOGG & ROSE,
Attorneys for Defendant in Error.

Statement of the Facts and Objects of the Motions.

This action was brought to recover the sum of $25,-106.50, with interest, on a supersedeas bond executed by James A. Whitcomb, as principal, and by the Plaintiff in Error, American Surety Company of New York, as surety, in the sum of $30,000, to secure a stay pending a hearing by the Circuit Court of Appeals for the Second Circuit on a Writ of Error to the District Court for the Southern District of New York to review a judgment in favor of the Defendant in Error, George S. Shultz, against said James A. Whitcomb for the sum of $25,106.50, entered upon a verdict rendered upon a trial on the law side of said District Court to recover damages for the breach of a contract. (See Record, pp. 3-5, fols. 6-9.)

To the complaint the Plaintiff in Error (Defendant below) interposed a demurrer on the grounds:

(1) That the District Court had no jurisdiction of the subject matter of the action, in that

(2) No diversity of citizenship of the parties was shown by the complaint; and

(3) That the action was an original action based solely upon a contract, to wit: the bond set forth in the complaint; and

(4) That neither the Constitution nor any Law of the United States was involved in the cause of action alleged; and

(5) That said action did not involve the consideration or application of such Constitution or Law; and

(6) That said action did not involve any question of the validity of such Law or of any State Law; and

(7) That said action did not involve any matter or question within the jurisdiction of the said District Court or any United States Court.

(See Record, p. 6, fol. 11.)

The judgment in favor of the Defendant in Error against said Whitcomb, to secure a stay of the enforcement

of which pending the review thereof by the Circuit Court of Appeals the bond in question was given, grew out of a contract entered into between the Robertson Sales Company, a New Jersey corporation, and the Great American Automatic Vending Machine Company, also a New Jersey corporation, for the manufacture by the Machine Company of ten thousand vending machines, under patents pending of the Sales Company, "like to the model" deposited by the Sales Company (except as to certain alterations specified in the agreement), including all dies, patterns, special tools, etc., necessary for the manufacture of said machines, for the sum of $46,000.

In consideration of the making of the contract, and of the sum of $1.00 paid by the Machine Company, said Whitcomb executed a written guarantee to the effect that the Sales Company would faithfully perform and fulfill the contract on its part.

The Machine Company proceeded in the performance of the contract and continued therein until January 1st, 1910, at which time 2100 machines had been manufactured and delivered. On that date the Sales Company refused absolutely to accept further deliveries under the contract and wholly repudiated the same for the reason, as claimed, that a large number of machines would not work and were worthless.

After the repudiation of the contract, an action was commenced by the Defendant in Error, as the assignee of the Machine Company, against said Whitcomb on his guarantee of the contract, in the Supreme Court of the State of New York, to recover damages for said breach, which action subsequently, upon the application of Whitcomb, was removed to the United States Circuit Court for the Southern District of New York, on the ground of the diverse citizenship of the parties, said Shultz being a citizen of the State of New York and said Whitcomb being a citizen of the State of Oklahoma.

The action came on for trial before the *Hon Julian W. Mack* and a Jury at a Term of the District Court (the Circuit Court in the meantime having been abolished), which trial lasted for a period of nearly three weeks. The Jury

returned a verdict in favor of the Defendant in Error for the sum of $24,607.95, upon which verdict a judgment was entered for the sum of $25,106.50 damages and costs.

A Writ of Error was sued out by Whitcomb to review said judgment by the Circuit Court of Appeals for the Second Circuit, and to stay the execution thereof pending the hearing the supersedeas bond referred to in the complaint was given. After due hearing the judgment was affirmed by the Circuit Court of Appeals.

On said appeal the principal contention by Whitcomb was that the Machine Company was itself obliged to manufacture all the various parts of the machine, and that it violated said contract by purchasing some of the parts from independent dealers and supply houses, and by allowing the dies, patterns, etc., to leave its possession during performance to enable other dealers to furnish some of the necessary parts.

This contention was overruled by the Circuit Court of Appeals on the ground that under the terms of the contract the obligations of the Machine Company were performed if the machines were manufactured "like to the model" deposited, and that no obligation rested upon it to manufacture itself all the various parts of the machines, but it was at liberty, as it did, to purchase some of the parts from independent dealers, and had the right to allow the dies and patterns to leave its possession during performance to enable other dealers to furnish some of the necessary parts, and that the Jury having found that the machines manufactured were like the model, the plaintiff was entitled to recover.

(See Opinion, *Ward*, J., annexed hereto.)

After the affirmance by the Circuit Court of Appeals, an action was begun in equity by Whitcomb to restrain the enforcement of the judgment on the ground that the contract had been induced by fraudulent representations made by the Machine Company as to its experience in and its facilities for the manufacture of vending machines, which defense, being an equitable defense, it was claimed, he was precluded from interposing in the action at law.

An order to show cause why an injunction *pendente lite* should not issue was granted by *District Judge Hand,* together with a restraining order staying all proceedings for the enforcement of the judgment until the hearing and decision of the motion.

On the return of the order to show cause, *Judge Hand* rendered a decision denying the motion for a temporary injunction and vacating the restraining order on the ground that it having been decided by the Circuit Court of Appeals that the Machine Company was not obliged to manufacture all of the various parts itself and that its obligations were fulfilled by the manufacture of machines like the model submitted, the alleged misrepresentations as to the experience and facilities of the Machine Company were as to entirely immaterial and irrelevant facts and afforded no ground whatsoever for the equitable interference of the Court.

(See Opinion, *Hand,* J., annexed hereto.)

After the denial of the motion for a temporary injunction, the defendant moved under Equity Rule 29 for judgment on the pleadings, which motion came on for hearing before *Circuit Judge Lacombe,* who granted the same and directed judgment dismissing the complaint, the learned Judge stating in a memorandum handed down by him that he fully concurred with *Judge Hand's* opinion.

(See Memorandum, *Lacombe,* J., annexed hereto.)

Thereupon the present action was begun to recover upon the supersedeas bond referred to. Upon the commencement thereof an action in equity was begun by the Plaintiff in Error to restrain the prosecution of said action, alleging the same facts as in the action in equity brought by Whitcomb to restrain the enforcement of the judgment, and on the further ground that the District Court was without jurisdiction to entertain the action because there was no diversity of citizenship alleged.

A motion was made by the defendant for judgment on the pleadings dismissing the complaint in that action, on the ground that the facts therein alleged did not constitute a cause of action in equity.

The motion came on for hearing before *Circuit Judge Lacombe* and was granted, and the complaint was directed to be dismissed. By the dismissal of the complaint *Judge Lacombe* necessarily decided—

(1) That the alleged misrepresentations referred to were as to entirely immaterial and irrelevant facts; and

(2) That the District Court had jurisdiction to enforce liability on the supersedeas bond, notwithstanding no diversity of citizenship was alleged.

After the decision by *Judge Lacombe* a demurrer to the complaint in the present action was interposed, wholly and solely on the ground, as appears on the face thereof, that the District Court was without jurisdiction of the action.

(See Record, p. 6, fol. 11.)

Thereupon a motion for judgment was made by the Defendant in Error under Section 537 and Section 547 of the New York Code of Civil Procedure, providing that if a demurrer is frivolous, the party prejudiced thereby, upon notice to the adverse party, may apply to the Court for judgment thereupon and judgment may be given accordingly, which motion came on for hearing before *District Judge Hazel* and was granted on the ground, as appears by his memorandum of opinion, that the District Court clearly had jurisdiction and that the demurrer was wholly frivolous and without merit.

(See Mem., *Hazel*, J., Record, p. 7, fol. 13.)

The printed Record has been filed in the case at bar, which makes it unnecessary to print as a part of this Brief any of the proceedings in the Court below.

Argument of the Motion to Affirm.

The supersedeas bond sued upon was given to procure a stay of the enforcement of a judgment rendered in an action in the District Court pending a review on error by the Circuit Court of Appeals.

An action brought to enforce liability on such a bond, after the affirmance of the judgment, is an action arising under the Laws of the United States, of which a United States Court has jurisdiction irrespective of the citizenship of the parties.

Tullock *vs.* Mulvane, 184 U. S., 497;
Leslie *vs.* Brown, 90 Fed. Rep., 171;
Crane *vs.* Buckley, 105 Fed. Rep., 401;
Files *vs.* Davis, 108 Fed. Rep., 465;
Egan *vs.* Chicago Great Northwestern Ry. Co., 163 Fed. Rep., 344;
Mississippi Valley Fuel Co. *vs.* Watson Coal Co., 202 Fed. Rep., 122;
St. Louis I., M. & S. Ry. Co. *vs.* Bellamy, 211 Fed. Rep., 172;
Arnold *vs.* Frost, 9 Benedict, 267; Federal Cases, No. 558.

In *Tullock* vs. *Mulvane* (*supra*) it was expressly held by this Court that an action on an injunction bond given in the course of proceedings in a Federal Court presented a federal question for review by this Court on Writ of Error to a State Court. *Mr. Justice White,* writing, said:

"It may not, we think, be doubted that a bond for "injunction in an equity court of the United States "given under the order of such court is a bond exe- "cuted in and by virtue 'of an authority exercised un- "der the United States.' Rev. Stat. §709. Certainly, "the courts of the United States derive all their pow- "ers from the Constitution and Laws of the United "States, and their authority is therefore exercised "thereunder. Being, then, an obligation entered into "by virtue of such authority, the conclusion cannot "be escaped that the defense specially set up, that no "liability on the bond could arise until the court of the "United States in which the controversy was pending "had finally determined that the injunction should

"not have been granted, was the assertion of an im-
"munity from liability depending on an authority ex-
"ercised under the United States, and therefore neces-
"sarily involved the decision of a Federal question."

Tullock *vs.* Mulvane (*supra*).

To the same effect is the decision in *Leslie* vs. *Brown* (*supra*) by the Circuit Court of Appeals, Sixth Circuit, in which *Circuit Judge Taft* wrote the opinion and *Circuit Judge Lurton* and *District Judge Severens* concurred. *Judge Taft* said:

"We have no doubt that an action at law in the
"federal court may be brought on such a bond, pro-
"vided the necessary amount is involved, on the ground
"that the plaintiff is enforcing rights secured to him
"under the constitution and laws of the United
"States."

And distinguishing *Merryfield* vs. *Jones* (2 Curt. 306, Fed. Cases No. 9,486), and *Bein* vs. *Health* (12 How., 168), *Judge Taft* said that they were decided at a time when the Circuit Courts of the United States did not have original jurisdiction to enforce causes of action arising under the Laws and Constitution of the United States, which branch of jurisdiction was not conferred until the Act of 1875.

Leslie *vs.* Brown (*supra*).

In *Crane* vs. *Buckley* (*supra*) it was held that an action on a supersedeas bond given on an appeal from the decree of a Circuit Court to the Circuit Court of Appeals, in accordance with the Revised Statutes, Section 1000, to recover the damages sustained by the appellee, was one involving questions arising under the Laws of the United States and was removable into the Circuit Court. *Circuit Judge Morrow* said:

"The writ in this case was a supersedeas and the
"security given therefor extended to damages as well
"as to costs. The question for determination is: Has
"this Court jurisdiction of the action? It has been
"held that such a controversy is one springing out of
"a suit already determined in the Federal Court, and

"is in one sense an offshoot of that suit (Seymour *v.* "Construction Co., Fed. Cas., No. 12,689, 7 Biss., 460); "and further in the same case that a supersedeas bond "is an indemnity given in pursuance of a law of the "United States. The measure of the liability of the "party and the rights of both plaintiff and defendant "depend upon a law of the United States and a rule "of the Supreme Court of the United States (No. 29). "It is impossible to take a step in the progress of a "suit brought upon such a bond in order to determine "the rights of the parties without looking at the law "and the rule as the guide of the Court and controlling "its judgment in the determination of the case. And "in Arnold *v.* Frost, Fed. Cas. No. 558, 9 Ben., 267— "a suit for recovery on a bond given on appeal—the "Court in positive terms declared it to be not an orig- "inal suit but an offshoot or outbranch of the suit in "which the bond was given, and that jurisdiction of the "original suit gave jurisdiction over the subject mat- "ter of the suit on the bond. The action under consid- "eration is based upon proceedings in the United "States Circuit Court acting under authority conferred "by a law of the United States and a rule of the Cir- "cuit Court of Appeals (No. 13). It therefore presents "a question arising under the laws of the United "States, and so within the jurisdiction of this court."

Crane *vs.* Buckley (*supra*).

In *Arnold* vs. *Frost* (*supra*), referred in the opinion last quoted the precise question was presented and decided. *District Judge Blatchford* expressly held that the District Court had jurisdiction of an action brought to recover on a bond on an appeal to the Circuit Court from a final decree in a suit in Equity in the District Court, notwithstanding there was no diversity of citizenship between the parties. He said:

"This Court has jurisdiction of this suit. It is not "an original suit, but it is an offshoot or outbranch "of the suit in which the bond was given, and jurisdic- "tion of that suit gives jurisdiction of the subject mat- "ter of this suit, the defendants having been duly "served with process in this suit."

Arnold *vs.* Frost (*supra*).

Damages at the Rate of Ten Per Cent. Should Be Awarded in Favor of the Defendant in Error.

The cases to which reference has been made, it is therefore submitted, decide the precise question raised by the demurrer in the present action in favor of the jurisdiction of the District Court over the present cause.

The question presented having been repeatedly and conclusively settled adversely to the contention of the Plaintiff in Error, this case is clearly one covered by *Rule 6* of this Court, providing for the affirmance of a judgment on motion where it appears that the appeal is wholly without any merit whatsoever and obviously taken for the purpose of delay only.

If, however, this Court should consider that any question whatsoever is presented which does require argument, then it is respectfully requested that the present case be transferred to the Summary Docket for hearing at an early date.

Damages at the Rate of Ten Per Cent. should be awarded in favor of the Defendant in Error.

It is obvious that the demurrer was interposed solely for the purpose of delay and to prevent the collection of the judgment obtained by the Defendant in Error against Whitcomb after a full and fair trial before a Jury, and after all the contentions available to him and raised by his counsel had been passed upon adversely by the Circuit Court of Appeals and the judgment in favor of the Defendant in Error affirmed.

Immediately upon the affirmance by the Circuit Court of Appeals an action in Equity was begun by Whitcomb to restrain the enforcement of the judgment, and a temporary injunction was sought by him to prevent the enforcement thereof.

The motion for an injunction was heard and carefully considered by *Judge Hand* and an opinion was written disposing absolutely of the contentions made.

The same questions also were presented to *Circuit Judge Lacombe* on a motion made by the defendant for

judgment dismissing the complaint, and were decided by him in the same manner as by *Judge Hand* and upon the same grounds.

Not satisfied with a review by the Circuit Court of Appeals and by decisions by two learned and able Judges, an action in Equity was begun by the Plaintiff in Error in the present action raising precisely the same questions as in the action in Equity begun by Whitcomb, with an additional ground that the District Court was without jurisdiction to enforce liability. The bill was so obviously without merit that on motion *Judge Lacombe* directed judgment dismissing it.

The Plaintiff in Error having no defense on the merits thereupon sought further delay by interposing a demurrer to the complaint in the present action, raising the sole question of the jurisdiction of the Court, although that question had been presented to and decided adversely by *Judge Lacombe* in the action in Equity brought by the Plaintiff in Error to restrain the enforcement of liability on its bond.

Although the breach of the contract entered into occurred as early as January, 1910, and although an action to enforce damages for the breach was begun on April 30th, 1912, and a judgment obtained in favor of the plaintiff therein on June 14th, 1913, and was affirmed by the Circuit Court of Appeals and its mandate handed down on July 1st, 1914, the Defendant in Error by the interposition of the frivolous demurrer in the present action has been prevented from receiving his just due.

While no complaint is made as to the right of Whitcomb to a full and fair trial and to a full and fair review of the judgment rendered against him by the Circuit Court of Appeals, both of which he has had, complaint is made of the making use by him and his surety of the forms of law, coupled with their ability to give bonds to stay execution against them, to prevent the payment of their just debts and obligations.

It would seem that this case is eminently one where a Writ of Error has been sued out to delay the proceedings on the judgment of an inferior Court, and which has had that

direct effect and that under Rule 23 of this Court damages at the rate of 10% should be awarded on the amount of the judgment recovered.

Respectfully submitted,

KELLOGG & ROSE,
Attorneys for Defendant in Error.

ABRAM J. ROSE,
Of Counsel.

Opinion, Ward, J.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

JAMES A. WHITCOMB,

vs.

GEORGE S. SHULTZ.

Defore:

LACOMBE, WARD & ROGERS, *JJ.*

WARD, *J.*

The Great American Automatic Vending Machine Company, plaintiff's assignor, agreed to manufacture for the Robertson Sales Company 10,000 vending machines like a model submitted. The defendant Whitcomb became surety for the faithful performance of the contract by the Sales Company. By January 1, 1910, the Vending Company had delivered 2100 machines, after which date the Sales Company refused to receive any more. Thereupon the plaintiff brought this action at law against the defendant as surety, to recover the damages sustained by the Vending

Company, being first, the balance due unpaid upon the 2100 machines delivered, with interest at six per cent.; second, the cost of materials purchased for the manufacture of the 10,000 machines, less what was used in the 2100 delivered; third, the profits on the 7900 machines remaining to be delivered. The jury returned a verdict for the plaintiff. This is a writ of error to a judgment entered thereon.

Many errors are assigned because of Judge Mack's refusal to charge as requested, but we think that his charge was full, careful and impartial and properly covered the requests.

The defendant relies greatly on the proposition that the plaintiff did not manufacture the machines because it employed other parties to make many of the parts and therefore has no cause of action. The Court rightly charged the jury that the plaintiff's assignor was not obliged itself to manufacture all the parts. There was evidence that the model submitted was manufactured in the same way and that the officers of the Sales Company knew before they repudiated the contract that the Vending Company was itself making only some parts of the machine, employing third parties to make other parts.

The material question was whether the Vending Company manufactured machines substantially like the model. If it did, it performed its contract. It was not responsible for the operation of the machines. This question was fully and fairly presented to the jury, who decided it in the plaintiff's favor upon a conflict of testimony and this finding is binding upon us.

The defendant also contends that the plaintiff failed to perform the contract because it did not keep in its possession the dies, patterns, etc., so as to be able to conform to the requirement of the contract that it should deliver the same to the Sales Company upon its demand in first class condition upon the completion of the contract. This is a quite immaterial consideration, because the contract never was completed, having been repudiated by the Sales Company after 2100 machines had been delivered.

The trial occupied nearly three weeks and the defendant took a multitude of hypercritical exceptions to the proof

of damage offered by the plaintiff. The unpaid balance due upon the machines actually delivered was a mere question of mathematics. In respect to the cost of material ordered by the plaintiff's assignor, there was primary proof, confirmed by the receipted bills of the vendors and the plaintiff's checks in payment thereof. Finally, there was evidence as to the cost of making the machines as compared with the price the plaintiff was to receive, showing the loss of profits. There was sufficient competent evidence to enable the jury to determine the amount of the plaintiff's damages with reasonable certainty and we are not disposed to be astute to discover and discuss errors in this long trial which in our opinion were harmless. The judgment is affirmed.

Opinion, Hand, J.

UNITED STATES DISTRICT COURT,
SOUTHRN DISTRICT OF NEW YORK.

JAMES A. WHITCOMB,

against

GEORGE S. SHULTZ.

HAND, *D. J.:*

The theory of the bill is this: The Machine Company in order to procure the contract represented that they had themselves all the mechanical and industrial means for making the whole machines in their shops, and that they meant to make them there. In fact, unknown to the plaintiff, they had no such facilities and never did make them in the shops nor did they ever intend to do so. This was a fraud which justifies the cancellation of the contract.

There is a very simple and conclusive answer to this reasoning, that is, that as the contract entered into did not require the Machine Company to build the machines in their shops, but only to deliver machines made like the model,

the fact is quite immaterial that they could not have done them in their shops. It has now been finally and authoritatively adjudicated between the parties in the action at law that the contract has the interpretation which I have just mentioned and that puts an end to the case. Fraud must touch some matter material to the action of the injured party; it must be a statement about facts whose truth would have kept the victim away from his injury. If the injury of which he complains is entering into a contract, as here, then it must appear that knowledge of the facts would have resulted in his refusing the contract. If the contract allowed the Machine Company to manufacture anywhere, it is impossible to see how knowledge of the fact that they must manufacture out of their shops, could be material. If the contract was as Whitcomb contended upon the trial of the action at law, a contract to manufacture in the Machine Company's shops only, then the false statements would have constituted fraud, and to manufacture out of the shop would have been insufficient performance.

Of course, a contract may through fraud fail to represent the true intent of the parties and may be reformed for that reason, but no such question is raised here. The plaintiff obviously could not now take that position, and we must suppose that the contract correctly embodied the purpose of the parties to allow the machines to be made anywhere and assembled by the Machine Company. It may perhaps be still further argued, that, although the contract allowed the machines to be made elsewhere, the assurances of the Machine Company gave the plaintiff to suppose that they would in fact be made in the shop. Such an assurance can hardly be the basis of any right when accompanied by a formal undertaking which imposes different obligations, but even if we should assume that it might be the basis of an action for deceit or upon a collateral contract, at least it is absurd to talk about it as a fraud which resulted in the execution of this contract.

If these facts could constitute any such fraud, they would have been a good defense in the action at law because they would have shown that the Machine Company had not substantially performed. They were unsuccessful in that

action because the contract was more liberally interpreted, and the same interpretation makes it quite impossible to urge that there was any fraud which justifies cancelling the contract. That the court put this construction upon the contract the record abundantly proves. My reliance is upon the judge's charge, and especially upon that part contained between folio 1778 and folio 1790. Here it appears that the only material question left to the jury was whether the machines when made corresponded with the Plumb model; if so, it made no difference where the parts were made. "I find nothing in this contract to justify a claim that the Machine Company itself had to manufacture all of the parts and all dies, patterns and special tools personally and had to manufacture all those dies, patterns and special tools, for each and every distinct part" (fol. 1780).

The motion is denied. I will give no stay pending an appeal, unless the plaintiff can show me that Shultz is not responsible, nor then either, if the Machine Company will agree to pay any judgment against Shultz, unless the Machine Company is also shown to be irresponsible. In those cases I may consider that question.

July 18, 1914.

LEARNED HAND.

D. J.

Memorandum, Lacombe, J.

Indorsed on the Notice of Motion for judgment on Pleadings.

"I concur fully with Judge Hand's opinion; the motion is granted.

Aug. 4, '14.

E. H. LACOMBE,
U. S. Cir. J."

Whitcomb *v.* Shultz—Equity 11-288.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914

No. 643

AMERICAN SURETY COMPANY OF NEW YORK
Plaintiff-in-Error
(Defendant below)

against

GEORGE S. SHULTZ
Defendant-in-Error
(Plaintiff below)

(IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK)

BRIEF ON BEHALF OF DEFENDANT IN ERROR

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 643.

AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiff-in-Error,
(Defendant below),

against

GEORGE S. SHULTZ,
Defendant-in-Error,
(Plaintiff below).

In Error to the District Court of the United States for the Southern District of New York.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement.

This case comes before this Court on writ of error and certificate of the question of jurisdiction to review a judgment in favor of George S. Shultz (plaintiff below), against the American Surety Company of New York (defendant below), for the sum of $26,972.68, entered upon an order made by DISTRICT JUDGE JOHN R. HAZEL at a TERM of the UNITED STATES DISTRICT COURT for the SOUTHERN DISTRICT OF NEW YORK overruling the demurrer interposed by the defendant

to the complaint, and directing judgment in the plaintiff's favor upon the pleadings.

See Writ of Error, p. 1, fols. 1-2.
See Certificate as to Jurisdiction, pp. 8-10, fols. 15-18.
See Order for Judgment, pp. 7-8, fol. 14.
See Judgment, p. 8, fol. 15.

Facts.

The judgment in favor of Shultz against Whitcomb, to secure a stay of the enforcement of which pending the review by the Circuit Court of Appeals the bond in question was given, grew out of a contract entered into between the Robertson Sales Company, a New Jersey corporation, and the Great American Automatic Vending Machine Company, also a New Jersey corporation, for the manufacture by the Machine Company of ten thousand vending machines under patents pending of the Sales Company "like to the model" deposited by the Sales Company (except as to certain alterations specified in the agreement), including all dies, patterns, special tools, etc., necessary for the manufacture of said machines, for the sum of $46,000.

In consideration of the making of the contract and of the sum of $1.00 paid by the Machine Company, Whitcomb executed a written guaranty to the effect that the Sales Company would faithfully perform and fulfill the contract on its part.

The Machine Company proceeded in the performance of the contract and continued therein until January 1st, 1910, at which time 2100 machines had been manufactured and delivered. On that date the Sales Company refused absolutely to accept further deliveries under the contract and wholly repudiated the same for the reason, as claimed, that a large number of machines would not work and were worthless.

After the repudiation of the contract an action was commenced in the Supreme Court of the State of New York

by Shultz, as the assignee of the Machine Company, against Whitcomb on his guaranty of the contract to recover damages for said breach, which action, upon the application of Whitcomb, was removed to the United States Circuit Court for the Southern District of New York on the ground of the diverse citizenship of the parties, Shultz being a citizen of the State of New York and Whitcomb being a citizen of the State of Oklahoma.

The action came on for trial before the Hon. Julian W. Mack and a jury at a Term of the District Court (the Circuit Court in the meantime having been abolished), which trial lasted for a period of nearly three weeks. The jury returned a verdict in favor of Shultz for the sum of $24,607.95, upon which verdict judgment was entered for the sum of $25,106.50 damages and costs.

A writ of error was sued out by Whitcomb to review said judgment by the Circuit Court of Appeals for the Second Circuit, and to stay the execution thereof pending the hearing, the supersedeas bond sued upon in this action was given. After due hearing the judgment was affirmed by the Circuit Court of Appeals.

On the trial before Judge Mack, and also on the appeal to the Circuit Court of Appeals, the principal contention by Whitcomb was that the machines manufactured were not like the model deposited, and also that the Machine Company violated the contract by purchasing some of the parts from independent dealers and supply houses instead of manufacturing itself all the various parts of the machines, and by allowing the dies, patterns, etc., to leave its possession during performance to enable other dealers to furnish some of the necessary parts.

That the machines manufactured were exactly like the model deposited was expressly found by the jury on the trial before Judge Mack, and the contention that the Machine Company was itself obliged to manufacture all the various parts was overruled both by the learned Trial Judge and by the Circuit Court of Appeals on the ground that the obligations of the Machine Company were per-

formed if the machines were manufactured like the model deposited.

See Opinion, CIRCUIT COURT OF APPEALS, WARD, *J.* (annexed hereto).

After the affirmance by the CIRCUIT COURT OF APPEALS, an action in equity was begun by Whitcomb to restrain the enforcement of the judgment on the ground that the contract had been induced by fraudulent representations by the Machine Company as to its experience in and its facilities for the manufacture of vending machines, which defense, being an equitable defense, it was claimed he was precluded from interposing in the action at law.

An order to show cause why an injunction *pendente lite* should not issue was granted by DISTRICT JUDGE LEARNED HAND, together with a restraining order staying all proceedings for the enforcement of the judgment until the hearing and decision of the motion.

On the return of the order to show cause JUDGE HAND denied the motion and vacated the restraining order on the ground that it having been decided by the CIRCUIT COURT OF APPEALS that the Machine Company was not obliged to manufacture all of the various parts itself and that its obligations were fulfilled by the manufacture of machines like the model submitted, any alleged misrepresentations as to the experience and facilities of the Machine Company were as to entirely immaterial and irrelevant facts and afforded no ground whatsoever for the equitable interference of the Court.

See Opinion, HAND, *J.*, annexed hereto.

Upon the denial of the motion for a temporary injunction, Shultz moved under EQUITY RULE XXIX for judgment on the pleadings, which motion came on for hearing before CIRCUIT JUDGE LACOMBE, who granted the same and directed judgment dismissing the complaint, the learned Judge stating in a memorandum handed down that he fully concurred with JUDGE HAND'S opinion.

See Memorandum, LACOMBE, *J.*, annexed hereto.

From the judgment entered an appeal was taken by Whitcomb to the CIRCUIT COURT OF APPEALS, which appeal has been argued, but at the time of the writing of this brief, has not yet been decided.

Thereupon the present action was begun by Shultz against the American Surety Company as surety on the supersedeas bond referred to.

Upon the commencement thereof an action in equity was begun by the Surety Company against Shultz to restrain the prosecution of this action, alleging the same facts as were alleged in the equity action brought by Whitcomb, and further averring that the DISTRICT COURT was without jurisdiction to entertain the present suit because there was no diversity of citizenship alleged.

A motion was made by Shultz for judgment on the pleadings in that action also, on the ground that the facts therein alleged, as in the action brought by Whitcomb, did not constitute a cause of action in equity. This motion also came on for hearing before CIRCUIT JUDGE LACOMBE and the complaint was dismissed. From the judgment entered an appeal was taken by the Surety Company to the CIRCUIT COURT OF APPEALS, which appeal has been argued but has not yet been decided.

In addition to the proceedings above mentioned an action was brought and is still pending in the SUPREME COURT OF THE STATE OF NEW YORK by the Sales Company against the Machine Company to recover the sum of $4,914.36, the amount of payments made by the Sales Company under the contract for the manufacture of the vending machines, based on the same alleged misrepresentations set out in the two equity actions begun by Whitcomb and the American Surety Company, and on the further ground that the machines manufactured were not like the model deposited.

An action also was commenced by the Sales Company against the Machine Company, which also is pending, in the SUPREME COURT of the STATE OF NEW JERSEY for the identical relief and on the identical grounds made the basis of the New York action last mentioned.

Both of these last two actions are therefore based on the identical claim made in the original action: that the machines manufactured were not like the model, and which question of fact was decided adversely to that contention by the jury on the trial before JUDGE MACK; and on the identical alleged misrepresentations made the basis of the equity suits brought by Whitcomb and Shultz and overruled by both JUDGE LACOMBE and JUDGE HAND.

Thus, out of the original controversy no less than six independent actions and four appeals have arisen, viz.:

(A) An action at law brought by Shultz against Whitcomb to recover damages for the breach of the contract, and which, after a trial lasting three weeks before the Court and a jury, was decided in Shultz's favor.

(B) An action in equity brought by Whitcomb against Shultz to restrain the enforcement of the judgment in the original action, and which, on summary motion for judgment on the pleadings, was decided in Shultz's favor.

(C) An action at law brought by Shultz against the American Surety Company upon the supersedeas bond staying the enforcement of the judgment in the original action pending review by the Circuit Court of Appeals, and which, on summary motion for judgment on the pleadings, was also decided in Shultz's favor.

(D) An action in equity by the American Surety Company against Shultz to restrain the action on the supersedeas bond referred to, and which, on summary motion for judgment on the pleadings, was decided in Shultz's favor.

(E) An action at law by the Sales Company against the Machine Company to recover amounts paid for work done under the contract for the manufacture of the vending machines, based on the identical facts and involving identical questions of law with those decided in Shultz's favor in the various proceedings above referred to.

(F) An action at law by the Sales Company against the Machine Company in the State of New Jersey to recover

such payments, based on the same facts and on the same questions involved in the action brought in the Supreme Court of the State of New York.

(G) An appeal by Whitcomb to the Circuit Court of Appeals from the judgment rendered against him in the original action, which appeal, by the unanimous decision of the Court, was decided in Shultz's favor.

(H) An appeal by Whitcomb to the Circuit Court of Appeals from the judgment rendered against him in the equity action brought to restrain the enforcement of the judgment in the original action, which appeal has been argued but not yet decided.

(I) An appeal by the American Surety Company to the Circuit Court of Appeals from the judgment dismissing the complaint in the action brought by it to restrain the enforcement of the judgment on the supersedeas bond, which appeal also has been argued but not yet decided.

(J) An appeal by the American Surety Company to this Court in the present action.

These various proceedings have been referred to for the purpose of informing this Court of the vexatious and harassing tactics pursued by Whitcomb and his surety to avoid the payment of the judgment rendered against him in the original suit.

That the litigation instituted is purely for the purpose of delay and without any real merit is plain from the fact that in three of the actions the complaints made or the pleas interposed have been held on their face to be frivolous and summary judgment has been awarded on motion, and in the two actions remaining untried the same questions of fact and law are involved as were decided adversely to Whitcomb's contentions in the original suit.

Assignment of Errors.

The sole question before this Court is one of the jurisdiction of the District Court to entertain this action and

render judgment therein, and is stated in the certificate signed by JUDGE HAZEL as follows:

> "Has the District Court of the United States for "the Southern District of New York jurisdiction of a "plenary action at law commenced by original process "by a citizen of the State of New York against a cor- "poration organized under the laws of said State to "recover the sum of $25,106.50 exclusive of interest and "costs upon a bond or undertaking executed by said "corporation as surety and filed in the office of the "Clerk of said Court for the purpose of procuring a "supersedeas and stay of execution upon a writ of "error to a judgment rendered in said Court in favor "of the obligee and against the party who executed "said bond as principal, which judgment so superseded "and stayed had been entered in a plenary action at "law brought by said obligee against said principal in "the Supreme Court of the State of New York and by "said principal removed to said United States Court "for the Southern District of New York; (the said "surety not being a party to said action) it appearing "that no question is raised by either party as to the "validity or meaning of the bond or undertaking or "of the statute or rule of Court pursuant to which the "same was given?"

See Certificate of Question of Jurisdiction, p. 9, fols. 17-18.

See Assignment of Errors, p. 10, fol. 19.

POINT I.

The action being one to enforce liability on a supersedeas bond given to procure a stay of execution on a judgment rendered in an action in the District Court, pending a review on error by the Circuit Court of Appeals, it is an action arising under the Laws of the United States of which a United States Court has jurisdiction, irrespective of the citizenship of the parties.

FIRST: By the Judicial Code (Act of March 3rd, 1911) it is provided:

> "SECTION 24. The District Court shall have original jurisdiction as follows:
>
> "1. Of all suits of a civil nature at common law "or in equity * * * * where the matter in controversy "exceeds, exclusive of interest and costs, the sum or "value of Three thousand dollars, and (a) ARISES UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES "OR TREATIES MADE, OR WHICH SHALL BE MADE, UNDER "THEIR AUTHORITY * * * **;"

This language is brought from and is identical with the previous Act defining the jurisdiction of the Circuit Courts.

See Act of March 3rd, 1875, Chapter 137; 18 Statutes at Large, 470.

SECOND: **An action on a supersedeas bond given pursuant to a Federal Statute is an action arising under the Laws of the United States within the meaning of the section referred to.**

1st. BY SECTIONS 1000 AND 1007 OF THE REVISED STATUTES, SPECIFIC PROVISION IS MADE FOR THE GIVING OF A BOND TO OPERATE AS A SUPERSEDEAS.

SECTION 1000 PROVIDES:

> "Every justice or judge signing a citation on any "writ of error shall, except in cases brought up by the

"United States or by direction of any department of "the Government, take good and sufficient security "that the plaintiff in error or appellant shall prosecute "his writ or appeal to effect, and if he fail to make his "plea good, shall answer all damages and costs where "the writ is a supersedeas and stays execution, or all "costs only where it is not a supersedeas as afore-"said."

SECTION 1007 PROVIDES:

"In any case where a writ may be a supersedeas, "the defendant may obtain such supersedeas by serv-"ing the writ of error or by lodging a copy thereof for "the adverse party in the clerk's office where the "record remains within sixty days (Sundays exclu-"sive) after the rendering of the judgment complained "of, and giving the security required by law on the "issuing of the citation. But if he desires to stay pro-"cess on the judgment, he may, having served his writ "of error as aforesaid, give the security required by "law within sixty days after the rendition of such judg-"ment or award with the permission of a justice or "judge of the appellate court. And in such cases "where a writ of error may be a supersedeas, execution "shall not issue until the expiration of ten days."

RULE XIII OF THE CIRCUIT COURT OF APPEALS PROVIDES:

"1. Supersedeas bonds in the circuit and district "courts must be taken with good and sufficient security "that the plaintiff in error or appellant shall prosecute "his writ or appeal to effect and answer all damages "and costs if he fail to make his plea good. Such "indemnity where the judgment or decree is for the "recovery of money not otherwise secured must be "for the whole amount of the judgment or decree, in-"cluding just damages for delay and costs and interest "on the appeal; but in all suits where the property in "controversy necessarily follows the suit, as in real "actions and replevin, and in suits on mortgages, or "where the property is in the custody of the marshal "under admiralty process, or where the proceeds "thereof or a bond for the value thereof is in the "custody of the court, indemnity in all such cases will "be only in an amount sufficient to secure the sum re-"covered for the use and detention of the property, and

"the costs of the suit and just damages for delay and "costs and interest on the appeal.

"2. On all appeals from an interlocutory order or "decree granting or continuing an injunction in a "circuit or district court, the appellant shall at the "time of the allowance of said appeal file with the clerk "of such circuit or district court a bond to the opposite "party in such sum as such court shall direct, to answer "all costs if he shall fail to sustain his appeal."

See Rule XIII, Circuit Court of Appeals, 150 Fed. Rep., XXVIII.

Thus, express provision is made for the giving of supersedeas bonds and the conditions thereof and liabilities thereunder, by the sections and the rule referred to.

2nd. AN ACTION ON SUCH A BOND IS ONE ARISING UNDER THE LAWS OF THE UNITED STATES OF WHICH THE DISTRICT COURT HAS JURISDICTION, IRRESPECTIVE OF THE CITIZENSHIP OF THE PARTIES.

Seymour *vs.* Phillips & Colby Construction Co., 7 Biss., 460; Federal Cases No. 12,689;

Crane *vs.* Buckley, 105 Fed. Rep., 401;

Egan *vs.* Chicago Great Western Ry. Co., 163 Fed. Rep., 344.

In SEYMOUR *vs.* PHILLIPS & COLBY CONSTRUCTION CO. (*supra*), the precise question was presented and decided in favor of the jurisdiction. In that case the plaintiffs recovered a judgment in the Circuit Court for the Northern District of Illinois against the defendant, who thereupon sued out a writ of error to this Court (as was then permissible) and gave a supersedeas bond. The writ of error was dismissed and a suit was brought upon the bond. A plea in abatement was put in alleging that all the plaintiffs and all the defendants were citizens of the State of Illinois, and that the Circuit Court in which the action was brought had no jurisdiction of the case.

CIRCUIT JUDGE DRUMMOND, holding that the action was

one arising under the Laws of the United States, of which a Federal Court had jurisdiction, irrespective of the citizenship of the parties, said:

> "The first section of the act of the 3rd of March, "1875 (18 Stat. 470), which we have had occasion "so often to examine since it was passed, declares "that 'circuit courts of the United States shall have " 'original cognizance concurrently with the courts of " 'the several states, of all suits of a civil nature at " 'common law or in equity, where the matter in dis- " 'pute exceeds, exclusive of costs, the sum or value of " 'five hundred dollars, and arising under the constitu- " 'tion or laws of the United States.' Now, IS THIS NOT "A MATTER IN DISPUTE ARISING UNDER THE LAWS OF THE "UNITED STATES, AS IT IS PRESENTED UPON THE FACE OF "PLEADINGS? IT IS AN INDEMNITY GIVEN IN PURSUANCE "OF A LAW OF THE UNITED STATES; THE MEASURE OF THE "LIABILITY OF THE PARTY, AND THE RIGHTS BOTH OF THE "PLAINTIFFS AND THE DEFENDANTS, DEPEND UPON A LAW OF "THE UNITED STATES, AND A RULE OF THE SUPREME COURT "OF THE UNITED STATES. IT IS IMPOSSIBLE TO TAKE A STEP "IN THE PROGRESS OF THE CAUSE IN ORDER TO DETERMINE "THE RIGHTS OF THE PARTIES, WITHOUT LOOKING AT THE "LAW AND THE RULE AS THE GUIDE OF THE COURT, AND CON- "TROLLING ITS JUDGMENT IN THE DETERMINATION OF THE "CASE."
>
> Seymour *vs.* Phillips & Colby Construction Co. (*supra*).

In CRANE *vs.* BUCKLEY (*supra*), an action was brought in the Superior Court of the State of California to recover on a supersedeas bond given on an appeal from a decree of the Circuit Court for the Southern District of California to the Circuit Court of Appeals, which Court affirmed the judgment. Upon the petition of the defendants the suit was removed from the State Court to the Circuit Court for the Northern District of California upon an allegation that the determination of the surety's liability depended upon the construction of an Act of Congress, namely; Section 1000 of the Revised Statutes. The plaintiff moved to remand the case to the State Court and contended that the defendants' liability arose exclusively under their own contract as contained in the supersedeas bond, and that the de-

termination of such liability was not dependent upon the construction of any United States Law.

CIRCUIT JUDGE MORROW, denying the motion to remand, said:

> "The action under consideration is based upon pro-
> "ceedings in the United States Circuit Court acting
> "under authority conferred by a law of the United
> "States and a rule of the circuit court of appeals (No.
> "13). 31 C. C. A. CLIII, 90 Fed. CLIII. IT THEREFORE
> "PRESENTS A QUESTION ARISING UNDER THE LAWS OF THE
> "UNITED STATES, AND SO WITHIN THE JURISDICTION OF
> "THIS COURT."

Crane *vs.* Buckley (*supra*).

In EGAN *vs.* CHICAGO GREAT WESTERN RY. CO. (*supra*), a judgment for the recovery of money was rendered by a Circuit Court of the United States in Iowa in an action at law, and a writ of error was sued out to review said judgment by the Circuit Court of Appeals, and a proceeding by motion was commenced in the Circuit Court for the Northern District of Iowa to enforce liability on a supersedeas bond given to stay the judgment pending the review. No diversity of citizenship was shown. No question was raised as to the jurisdiction of the Court to enforce liability on the bond, but it was claimed that it must be by action and not by summary process. The Statutes of Iowa provided for the enforcement of an appeal bond upon motion if the damages could be accurately known without an issue and a trial.

It was held that the practice obtaining under the State law was applicable to a supersedeas bond given in a Federal Court sitting in that District, and that the liability of the sureties could properly be enforced by motion and order of a Federal Court.

Egan *vs.* Chicago Great Western Ry. Co. (*supra*).

Thus, in the three cases referred to, the jurisdiction of a Federal Court to enforce a supersedeas bond given in a Federal suit was expressly upheld; in two of which the right to entertain jurisdiction was expressly challenged on the ground that no diversity of citizenship was shown, and

in the third, while conceding the jurisdiction of the Court, the right to enforce such a bond by summary process in accordance with the State law prevailing, was denied, but upheld.

3rd. IN ANALOGY TO THESE DECISIONS ARE NUMEROUS DECISIONS IN ACTIONS ON BONDS, OTHER THAN SUPERSEDEAS BONDS, GIVEN UNDER FEDERAL STATUTES, *i. e.:*

(A) *An action on a bond given by a United States marshal for the faithful performance of his duties.*

Bock *vs.* Perkins, 139 U. S., 628;
Bachrack *vs.* Norton, 132 U. S., 337;
Feibelman *vs.* Packard, 109 U. S., 421;
Lawrence *vs.* Norton, 13 Fed. Rep., 1;
United States *vs.* Davidson, 1 Biss., 432; Fed. Cas. No. 14,921;
Adler *vs.* Newcomb, 2 Dillon, 45; Fed. Cas. No. 83.

In FEIBELMAN *vs.* PACKARD (*supra*), this Court upheld the jurisdiction of the Circuit Court to entertain an action on the official bond of a marshal and his sureties as one arising under a Law of the United States, and which might, therefore, be removed from a State to a Circuit Court.

MR. JUSTICE MATTHEWS said:

> "It is clear that the Circuit Court did not err in "directing the removal of the suit from the State Court; "for if we look at the nature of the plaintiff's cause of "action and the grounds of the defense as set forth "in his petition, it is apparent that the suit arose un- "der a law of the United States."

And in answer to the contention of counsel that the suit was to recover damages for the alleged trespass, the learned Justice said:

> "It was plaintiy upon the bond itself and, there- "fore, arose directly under the provisions of an Act of "Congress."

Feibelman *vs.* Packard (*supra*).

In BACHRACK *vs.* NORTON (*supra*), MR. JUSTICE BRADLEY, writing, said:

> "This is an action on a marshal's bond against "him and his sureties to recover damages for his "wrongful taking of the goods of the plaintiff under "an attachment issued out of the Circuit Court of the "United States for the Northern District of Texas "against one Myerson. According to the decision in "Feibelman *vs.* Packard, 109 U. S., 421, it is a case "arising under the Laws of the United States, and is "therefore within the jurisdiction of the Circuit Court "without any averment of citizenship of the parties."

Bachrack *vs.* Norton (*supra*).

And in BOCK *vs.* PERKINS (*supra*), MR. JUSTICE HARLAN, delivering the opinion, said:

> "A case, therefore, depending upon the inquiry "whether a marshal or his deputy has rightfully exe- "cuted a lawful precept directed to the former from a "Court of the United States is one arising under the "laws of the United States; for, as this Court has "said: 'Cases arising under the laws of the United "'States are such as grow out of the legislation of "'Congress, whether they constitute the right or privi- "'lege, or claim or protection, or defense of the party, "'in whole or in part, by whom they are asserted.' "* * * * * If the goods in question, when seized, were "the property of Lane, the marshal and his deputies "were in the discharge of duties imposed upon them "by the laws of the United States; and for any failure "in that regard he would be liable to suit by any one "thereby injured. Rev. Stat. §784. This case was "therefore one arising under the laws of the United "States, and removable from the state court."

Bock *vs.* Perkins (*supra*).

(B) *Likewise an action on a bond given by a contractor for the performance of public work.*

Mullin *vs.* United States, 109 Fed. Rep., 817; United States *vs.* Axman, 152 Fed. Rep., 816.

In UNITED STATES *vs.* AXMAN (*supra*), the opinion states:

> "The present statute confers rights which are special and dependent upon the law itself. It is a law "of the United States under which this suit was "brought, under which it is maintained, under which "judgment is to be entered. There cannot be a judgment entered in the case in favor of persons supplying the material and labor except upon this statute. "I therefore hold the jurisdiction in this case is to be "sustained as a suit arising under a law of the United "States."

United States *vs.* Axman (*supra*).

(C) *Also an action upon a bond given by a Clerk of a Court of the United States.*

Howard *vs.* United States, 184 U. S., 676.

MR. JUSTICE HARLAN, in that case, said:

> "But does it not appear from the petition itself "that the case was one of which the circuit court could "take cognizance independently of the citizenship of "the real parties in interest? This question must receive an affirmative answer. The suit was directly "upon a bond taken by the circuit court in conformity "with the statutes of the United States, and the case "depends upon the scope and effect of that bond and "the meaning of those statutes. It was therefore a "suit arising under the laws of the United States, of "which the circuit court (concurrently with the courts "of the state) was entitled to take original cognizance, "even if the parties had been citizens of the same "state."

Howard *vs.* United States (*supra*).

(D) *Also an action on the official bond of a cashier of a national bank.*

Walker *vs.* Windsor National Bank, 56 Fed. Rep., 76.

(E) *Also an action on an attachment bond executed in a suit pending in a Federal Court.*

Files *vs.* Davis, 118 Fed. Rep., 465.

In the opinion in that case it was said:

"In the case at bar the construction and applica-
"tion of Section 915 of the Revised Statutes and the
"rules of this Court adjudging the attachment laws
"of the State of Arkansas are directly involved * * *
"This action is therefore clearly one arising under the
"laws of the United States, and as the amount involved
"exceeds Two thousand dollars, exclusive of interest
"and costs, it is within the jurisdiction of this Court."

Files *vs.* Davis (*supra*).

(F) *And likewise an action on a bond given as a condition of the granting of a temporary injunction in an action brought in a Federal Court.*

Tullock *vs.* Mulvane, 184 U. S., 497;
Leslie *vs.* Brown, 90 Fed. Rep., 171;
Mississippi Valley Fuel Co. *vs.* Watson Coal Co., 202 Fed. Rep., 122;
St. Louis I., M. & S. Ry. Co. *vs.* Bellamy, 211 Fed. Rep., 172.

In TULLOCK *vs.* MULVANE (*supra*), MR. JUSTICE WHITE, writing, said:

"It may not, we think, be doubted that a bond for
"injunction in an equity court of the United States
"given under the order of such court is a bond executed
"in and by virtue 'of an authority exercised under the
" 'United States.' Rev. Stat. §709. Certainly, the courts
"of the United States derive all their powers from the
"Constitution and Laws of the United States, and their
"authority is therefore exercised thereunder. Being,
"then, an obligation entered into by virtue of such
"authority, the conclusion cannot be escaped that the
"defense specially set up, that no liability on the bond
"could arise until the court of the United States in
"which the controversy was pending had finally de-

"termined that the injunction should not have been "granted, was the assertion of an immunity from lia- "bility depending on an authority exercised under the "United States, and therefore necessarily involved the "decision of a Federal question."

Tullock *vs.* Mulvane (*supra*).

In LESLIE *vs.* BROWN (*supra*), CIRCUIT JUDGE TAFT, writing for the Circuit Court of Appeals, Sixth Circuit, (TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge), said:

"We have no doubt that an action at law in the "federal court may be brought on such a bond, pro- "vided the necessary amount is involved, on the ground "that the plaintiff is enforcing rights secured to him "under the constitution and laws of the United States."

Leslie *vs.* Brown (*supra*).

The present action is, therefore, clearly a suit arising under the Laws of the United States of which the District Court had jurisdiction wholly irrespective of the citizenship of the parties.

POINT II.

Moreover, this action is but an offshoot of, and ancillary and incidental to, the original suit in which the bond was given, and on that ground too the jurisdiction of the District Court may be sustained.

That an action on a bond given in a suit pending in a Federal Court is not an original suit, but ancillary and incidental to the action in which the bond was given, and that a Federal Court has jurisdiction of a suit thereon, irre-

spective of the citizenship of the parties, was expressly decided in the following cases:

Seymour *vs.* Phillips & Colby Construction Co., 7 Biss., 460; Fed. Cas. No. 12,689;
Arnold *vs.* Frost, 9 Benedict, 267; Fed. Cas. No. 558;
Lamb *vs.* Ewing, 54 Fed. Rep., 268;
Crane *vs.* Buckley, 105 Fed. Rep., 401.

In SEYMOUR *vs.* PHILLIPS & COLBY CONSTRUCTION CO. (*supra*), this ground of the jurisdiction of the Court was stated by CIRCUIT JUDGE DRUMMOND in the following language:

> "It is a controversy springing out of a suit already "determined in the Federal Court. It is in one sense "an offshoot of that suit. It would seem upon principle "that this is the proper forum to settle all controversies "growing out of that suit."
>
> Seymour *vs.* Phillips & Colby Construction Co. (*supra*).

In ARNOLD *vs.* FROST (*supra*) an appeal was taken to the Circuit Court from a decree in equity rendered by the District Court under the practice then prevailing. On such appeal a supersedeas bond was given. The Circuit Court affirmed the decree with costs to the appellees. Suit was brought on the bond in the District Court, and among other defenses set up was one that the Court had no jurisdiction of the suit. DISTRICT JUDGE BLATCHFORD, holding that the Court had jurisdiction, said:

> "It is not an original suit, but is an offshoot or "out-branch of the suit in which the bond was given, "and jurisdiction of that suit gives jurisdiction of "the subject matter of this suit, the defendants having "been served with process in this suit. Jones *vs.* An- "drews, 10 Wall., 327; Christmas *vs.* Russell, 14 Wall., "69 Bobbyshall *vs.* Oppenheimer, Case No. 1,592; "Hatch *vs.* Dorr, id., 6,206; Gwin *vs.* Breedlove, 2 How., "29; Dunn *vs.* Clarke, 8 Peters, 1."
>
> Arnold *vs.* Frost (*supra*).

In LAMB *vs.* EWING (*supra*), on the expiration of a stay bond given in an action pending in a Federal Court, the lands of the surety thereon were sold on execution to satisfy the judgment, but in view of a threatened appeal by the surety, the judgment-creditor was required, as a prerequisite to obtaining the money, to give a bond conditioned for re-payment thereof in case the order confirming the sale was reversed. No appeal, however, was taken, but the purchaser of the land brought ejectment against the stay bondsman and the sale was held to be void. Thereupon the Court ordered the judgment-creditor to re-pay the money into Court, and assigned the re-delivery bond to the purchaser of the land. The order was not complied with and the purchaser brought an action on the bond in the CIRCUIT COURT FOR THE DISTRICT OF NEBRASKA, the same Court in which the original action was commenced.

It was held that the action on the bond was merely auxiliary to the former suit, and that the CIRCUIT COURT had jurisdiction irrespective of the citizenship of the parties or the amount in controversy. DISTRICT JUDGE SHIRAS, writing for the CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, said:

> "The facts shown in the record, however, prove be-
> "yond question that this proceeding is one ancillary
> "to the original action of Charles W. Seymore and
> "William W. Wardell *v.* William P. Young, and the
> "jurisdiction of the court over that case, which is un-
> "questioned, supports the jurisdiction over the pro-
> "ceedings subsequently brought upon the bond given
> "under the circumstances hereinbefore stated. The
> "rule is well settled that where a court rightfully takes
> "jurisdiction over the parties and the subject-matter
> "of a controversy it has the right not only to render
> "judgment in the first instance, BUT ALSO TO SECURE TO
> "THE PREVAILING PARTY THE FRUITS OF SUCH JUDGMENT,
> "AND THE ORIGINAL JURISDICTION IS A CONTINUING ONE
> "FOR THAT PURPOSE. * * *"

Lamb *vs.* Ewing (*supra*).

And in CRANE *vs.* BUCKLEY (*supra*) it was said:

"It has been held that such a controversy is one "springing out of a suit already determined in the "Federal Court and is in one sense an offshoot of that "suit. Seymour *vs.* Construction Co., Fed. Cas. No. "12,689; 7 Biss., 460; * * * * And in Arnold *vs.* Frost "(Fed. Cas. No. 558; 9 Benedict, 267)—a suit for re- "covery on a bond given on appeal—the Court in posi- "tive terms declared it to be not an original suit, but "an offshoot or out-branch of the suit in which the "bond was given, and that jurisdiction of the original "suit gave jurisdiction over the subject-matter of the "suit on the bond."

Crane *vs.* Buckley (*supra*).

POINT III.

Against the array of authority referred to, the plaintiff in error has been unable to cite a single contrary decision, and the decisions relied upon by it are without application, and its contentions based thereon are altogether without merit.

FIRST: The contention that a case is not one "arising under the Law of the United States," unless the construction, scope or validity of the Statute is expressly in controversy, is wholly unfounded.

(1st) DISTRICT JUDGE AMIDON, sitting in the DISTRICT COURT OF NORTH DAKOTA in MCGOON *vs.* NORTHERN PACIFIC RAILWAY CO. (204 Fed. Rep., 998), harmonized the various decisions and stated the following pertinent views:

"So far as I am aware, the following is a correct "affirmative rule:

"Whenever federal law grants a right of property or of action, "and a suit is brought to enforce that right, such a suit arises under "the law creating the right, within the meaning of statutes defining "the jurisdiction of federal courts. * * *

"Jurisdiction upon the ground that the case arises "under the Constitution or laws of the United States

"cannot be shown by the answer or petition for re-
"moval, or by averments in the complaint as to the
"issue which the defendant will raise by his answer.
"(Citing cases). That jurisdiction must be shown
"wholly by plaintiff's statement of his own cause of
"action. Every such cause of action, however, is made
"up of matters of fact as well as law, and it must be en-
"tirely plain that the plaintiff by his statement of his
"own cause of action cannot show whether the defend-
"ant will take issue as to matters of fact or matters
"of law, and it is therefore impossible for the plain-
"tiff to show by his complaint that the case will 'really
" 'and necessarily involve a dispute or controversy
" 'as to a right which depends on the construction of
" 'the Constitution or some law or treaty of the United
" 'States.' It necessarily follows that such a rule
"(that it must appear that there will be a controversy
"as to the construction of the Constitution or Laws of
"the United States), if pressed to the extreme point
"for which plaintiff contends, would wholly destroy
"jurisdiction under this head, by prescribing conditions
"with which no plaintiff can ever comply. Congress,
"however, has declared that the District Court shall
"have jurisdiction of cases arising under the Constitu-
"tion and laws of the United States. This language is
"plain, and ought not to be wholly nullified by a pro-
"cess of reasoning which professes to ascertain its
"meaning. An interpretation which leads to such
"absurd results must be wrong.

**"What, then, do the courts mean when they say that the con-
"struction of federal law must be involved in order to confer this
"jurisdiction? Certainly not that the case will necessarily turn
"upon an interpretation of the statute, but simply that the complaint
"must set forth a cause of action of which federal law is an essential
"ingredient, and which may, therefore, properly involve a construc-
"tion of that law. * * ***

"The line of distinction which it seems to me will
"go far to harmonize the cases is this: When the com-
"plaint shows a case which arises out of a contract or a
"common-law right of property, and only indirectly
"and remotely depends on federal law, such a case not
"only does not, but cannot properly, turn upon a con-
"struction of such law. **But when the complaint asserts a
"right created by federal law, it presents a suit which may properly
"turn upon a construction of that law; and such a suit 'arises out**

"'of' the law for purposes of federal jurisdiction, notwithstanding "the defendant may raise only issues of fact by his answer."

McGoon *vs.* Northern Pacific Railway Co. (*supra*).

(2nd) In support of its contention that the present action is not one arising under a Federal law, two decisions by this Court are cited by the plaintiff-in-error.

Shulthis *vs.* McDougal, 225 U. S., 561;
Taylor *vs.* Anderson, 234 U. S., 74.

Both of those cases involved rights to land acquired under the laws of the United States restricting the alienation of lands allotted to Indian tribes. The Statutes simply constituted the sources of title and it did not appear by the bills that the immediate controversy in any way involved the validity of the title thus acquired.

Mr. Justice Van Devanter wrote the opinion in both cases. In the Shulthis case he said:

> "True, it contains enough to indicate that those "statutes constitute the source of the complainant's "title or right, and also shows that the defendants are "in some way claiming the land, and particularly the "oil and gas, adversely to him; but beyond this the "nature of the controversy is left unstated and uncer- "tain. Of course, it could have arisen in different "ways, wholly independent of the source from "which his title or right was derived. So, looking "only to the bill, as we have seen that we must, it "cannot be held that the case as therein stated was "one arising under the statutes mentioned."

Shulthis *vs.* McDougal (*supra*).

In the Taylor case the action was ejectment, and the petition, going beyond what was necessary to state a good cause of action, alleged that the defendants were asserting ownership under a deed which was void under the legislation of Congress restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians. These allegations, it was said by the learned Justice, were neither essential

nor appropriate in the petition and were inserted merely to anticipate and avoid a defense which it was supposed the defendants would interpose:

> "It is now contended that these allegations showed "that the case was one arising under the laws of the "United States,—namely, the acts restricting the alien- "ation of Choctaw and Chickasaw allotments,—and "therefore brought it within the circuit court's juris- "diction. BUT THE CONTENTION OVERLOOKS REPEATED DE- "CISIONS OF THIS COURT BY WHICH IT HAS BECOME FIRMLY "SETTLED THAT WHETHER A CASE IS ONE ARISING UNDER "THE CONSTITUTION OR A LAW OR TREATY OF THE UNITED "STATES, IN THE SENSE OF THE JURISDICTIONAL STATUTE "(NOW §24, JUDICIAL CODE), MUST BE DETERMINED FROM "WHAT NECESSARILY APPEARS IN THE PLAINTIFF'S STATE- "MENT OF HIS OWN CLAIM IN THE BILL OR DECLARATION, "UNAIDED BY ANYTHING ALLEGED IN ANTICIPATION OR "AVOIDANCE OF DEFENSES WHICH IT IS THOUGHT THE DE- "FENDANT MAY INTERPOSE.
>
> Taylor *vs.* Anderson (*supra*).

All that that case held, therefore, was that where the cause of action sued upon did not show a Federal question, such a question could not be injected by alleging in the statement of claim filed an anticipatory defense which the defendant might or might not set up.

The assertion, therefore, by the plaintiff-in-error that the entire argument upon which the decisions in SEYMOUR *vs.* PHILLIPS & COLBY CONSTRUCTION COMPANY (*supra*) and CRANE *vs.* BUCKLEY (*supra*) rest "has been disposed of by "two recent adjudications of this Court in which the opin- "ions were delivered by Mr. Justice Van Devanter, defin- "ing clearly what is meant by a case arising under a law "of the United States," is altogether unwarranted, as neither decision in any way involved a suit on a bond given under a Federal Statute, and in no way referred to or questioned the basis upon which those decisions and other analogous cases rest.

SECOND: Nor is the contention sound, that for the purpose of jurisdiction, a plenary action may not be incidental and ancillary to another suit, in the same court, as well as a summary proceeding by motion.

1st. WHETHER OR NOT A PROCEEDING IS ANCILLARY OR INCIDENTAL IS NOT TO BE DETERMINED BY ITS FORMAL CHARACTER OR BY THE PROCESS BY WHICH IT IS INITIATED, BUT BY ITS OBJECT. IF ITS PURPOSE IS TO GIVE EFFECT TO THE PROCEEDINGS, JUDGMENT OR DECREE IN A FORMER SUIT IN THE SAME COURT OR TO SECURE THE FRUITS AND BENEFITS THEREOF OR TO OBTAIN ANY RELIEF GROWING OUT THEREOF AND HAVING DIRECT REFERENCE THERETO, THEN IT IS NOT AN ORIGINAL, BUT A DEPENDENT AND ANCILLARY SUIT.

The following actions, although plenary in character and begun by original process, were held not to be independent, but dependent and ancillary:

(A) *An action to set aside a judgment for fraud.*

Pacific R. R. Co. of Missouri *vs.* Missouri Pacific Ry. Co., 111 U. S., 505;
Carey *vs.* Houston & Texas Central Ry. Co., 161 U. S., 115.

In the first case MR. JUSTICE BLATCHFORD said:

"On the question of jurisdiction, the suit may be "regarded as ancillary to the Ketchum suit, so that the "relief asked may be granted by the court which made "the decree in that suit, without regard to the citizen- "ship of the present parties, though partaking so far "of the nature of an original suit as to be subject to the "rules in regard to the service of process which are "laid down by Mr. Justice Miller in Pacific R. R. Co. "*v.* Mo. Pacific R. Co., 1 McCrary, 647. The bill, "though an original bill in the chancery sense of the "word, is a continuation of the former suit, on the "question of the jurisdiction of the circuit court."

Pacific R. R. Co. of Missouri *vs.* Missouri Pacific Ry. Co. (*supra*).

(B) *An action to enjoin an action at law on a replevin bond given in a suit brought in the State Court and removed to the United States Court.*

Kern *vs.* Huidekoper, 103 U. S., 494.

MR. JUSTICE WOODS, writing, said:

"The bill in this case was, therefore, ancillary to "the replevin suit and was in substance a proceeding in "the Federal Court to enforce its own judgment by "preventing the defeated party from wresting the re-"plevined property from the plaintiffs in replevin, who, "by the judgment of the Court, were entitled to it, or "what was in effect the same thing, preventing them "from enforcing a bond for the return of the property "to them."

Kern *vs.* Huidekoper (*supra*).

(C) *An action by a person whose property had been wrongfully taken under process by a United States Marshal to recover such property by proceedings in the Court in which the process issued.*

Coville *vs.* Heyman, 111 U. S., 176.

(D) *An action in equity brought to regulate a judgment or a suit at law in the same Court.*

Krippendorf *vs.* Hyde, 110 U. S., 276;
Johnson *vs.* Christian, 125 U. S., 642.

(E) *An action affecting property in the hands of a receiver.*

Milwaukee & Minnesota R. R. Co. *vs.* Soutter, 69 U. S., 609.

MR. JUSTICE MILLER said:

"It is not a question whether the proceeding is "supplemental and ancillary or is independent and "original in the sense of the rules of equity; but "whether it is supplemental and ancillary or is to be "considered entirely new and original in the sense "which this Court has sanctioned with reference to the "line which divides the jurisdiction of the Federal "Courts from that of the State Courts. No one, for "instance, would hesitate to say that according to "the English Chancery practice a bill to enjoin a judg-"ment at law is an original bill in the Chancery sense "of the word. Yet this Court had decided many times

"that when a bill is filed in the Circuit Court to enjoin "a judgment of that Court it is not to be considered "as an original bill, but as a continuation of the pro- "ceeding at law; so much so that the Court will pro- "ceed in the injunction suit without actual service of "subpoena on the defendant, and though he be a citi- "zen of another state, if he were a party to the judg- "ment at law."

Milwaukee & Minnesota R. R. Co. *vs.* Soutter (*supra*).

(F) *An action to enforce a lien upon property under foreclosure.*

McBee *vs.* Marietta & N. G. Ry. Co., 48 Fed. Rep., 243;
Hatcher *vs.* Hendrie & Bolthoff Mfg. & Supply Co., 133 Fed. Rep., 267.

In the HATCHER case (*supra*), CIRCUIT JUDGE VAN DEVANTER, writing for the CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, said:

"So a suit is dependent and ancillary the object "of which is to enforce an attachment lien obtained in "a former action in the same Court and to subject the "attached property, or the proceeds of its sale, to the "satisfaction of a judgment recovered in that action. "Such a suit is supplementary merely to the former "action and is a continuation thereof so far as the ques- "tion of jurisdiction is concerned."

Hatcher *vs.* Hendrie & Bolthoff Mfg. & Supply Co. (*supra*).

Whether, then, a suit is to be regarded as original or ancillary, is determined, not, as asserted by the plaintiff-in-error, by its formal nature and the process by which it was initiated, but by its relation to previous litigation in the same Court and by the relief demanded.

Under such a test the present action is clearly ancillary and incidental to the original suit in which the bond was given.

(2nd) The only decisions cited by the plaintiff-in-error are:

Reilly *vs.* Golding, 10 Wall, 56;
Hiriart *vs.* Ballou, 9 Peters, 156;
Smith *vs.* Gaines, 93 U. S., 341;
Beall *vs.* New Mexico, 16 Wall, 535;
Moore *vs.* Huntington, 17 Wall, 417.

Not one of them holds that a plenary suit begun by original process may not be incidental or ancillary to another action in the same Court.

They are simply to the effect that where the procedure of the State in which the proceeding is brought allows the enforcement of a bond on motion, such practice is also applicable to a proceeding in a Federal Court sitting in that State.

THIRD: Decisions to the effect that an action on a judgment rendered by a Federal Court is not one of which a Federal Court has jurisdiction in the absence of diversity of citizenship, are clearly without any application whatsoever.

The cases cited by the plaintiff-in-error are:

Provident Savings Society *vs.* Ford, 114 U. S., 635;
Metcalf *vs.* Watertown, 128 U. S., 586;
Carson *vs.* Dunham, 121 U. S., 421.

The basis of these decisions as stated by Mr. Justice Harlan in the Metcalf case is that such actions are simply "TO ENFORCE AN ORDINARY RIGHT OF PROPERTY BY SUING UPON THE JUDGMENT MERELY AS A SECURITY OF RECORD."

FOURTH: The decision in Tullock vs. Mulvane (184 U. S., 497), is not an authority in favor of the contention of the plaintiff in error.

That action was brought in a State Court upon an injunction bond given in a Federal Court, and came before this Court on writ of error to the State Court.

The jurisdiction of this Court in such a case is not

based alone on the fact that the action is one arising under the Laws of the United States, but it must appear by the record that a Federal right has been claimed and denied by the State Court. The searching of the record by this Court in the case referred to, made so much of by the plaintiff-in-error, was for the purpose of determining whether or not it was shown by the record before it, that a Federal question had been presented to and decided by the State Court.

Instead of this decision in any way helping out the plaintiff-in-error, it clearly is one in favor of the contention of the defendant-in-error and is cited and relied upon by him under POINT I of this brief.

FIFTH: The assertion that the proper theory upon which suits on contractors' bonds and bonds given by marshals and clerks of the United States Courts are brought, is that in such cases the United States is the real party plaintiff is altogether an incorrect statement of the law.

In the brief of the plaintiff-in-error, it is said:

> "Whatever doubt might have been previously entertained as to the proper theory upon which the suits were maintainable (i. e., on bonds of contractors, marshals and United States clerks), has been dispelled by the decision of this Court (U. S. Fidelity Co. *vs.* Kenyon, 204 U. S., 349) in which the Court expressly held that the correct basis of decision was that although the suit might be brought by a private individual in the name of the United States, that the United States had a real interest in the obligation of the bond being fulfilled, * * * * *"

See Brief for Plaintiff-in-Error, p. 14.

This is an entirely incorrect and misleading statement of the basis of the decision referred to. What was there held was that an action brought upon the bond of a contractor for a public work was maintainable in the Federal Courts, IRRESPECTIVE OF THE AMOUNT INVOLVED, because the United States was the real, and not merely the nominal, plaintiff, and set at rest the previous doubt expressed in IN RE HENDERLONG (102 Fed. Rep., p. 2), as to whether such

an action were maintainable IF THE AMOUNT IN CONTROVERSY WAS LESS THAN THE JURISDICTIONAL AMOUNT REQUIRED BY THE STATUTE.

It in no way questioned the right to maintain such an action as one arising under the Laws of the United States IF THE REQUISITE JURISDICTIONAL AMOUNT WERE INVOLVED.

POINT IV.

Damages at the rate of ten per cent. upon the amount of the judgment should be awarded in favor of the defendant in error.

FIRST: BY RULE XXIII OF THIS COURT IT IS PROVIDED:

> "2. In all cases where a writ of error shall delay "the proceedings on the judgment of the inferior Court, "and shall appear to have been sued out merely for "delay, damages at a rate not exceeding ten per cent., "in addition to interest, shall be awarded upon the "amount of the judgment."

SECOND: In the face of the many express decisions upholding the jurisdiction by Federal Courts of actions of the nature of the present one, and the absolute dearth of any contrary ruling, it is respectfully submitted the demurrer in the case at bar obviously was interposed wholly for the purpose of delay and to prevent the collection by the defendant in error of the judgment recovered in his favor.

Although the breach of the contract entered into occurred as early as January, 1910, and although the action to enforce damages for the breach was begun on April 30th, 1912, and the judgment in the plaintiff's favor was rendered on June 14th, 1913, and affirmed by the Circuit Court of Appeals and its mandate handed down on July 1st, 1914, the plaintiff-in-error, by the interposition of the frivolous demurrer in the present action, has prevented the defendant-in-error from receiving his just due.

While no complaint is made as to the right of Whit-

comb to a full and fair trial and to a full and fair review of the judgment rendered against him, both of which he has had, complaint is made of the use by him and his surety of the forms of law, coupled with their ability to give bonds to stay execution against them, to prevent the payment of their just debts and obligations.

It is respectfully submitted that this case is eminently one where a writ of error has been sued out to delay the proceedings on the judgment of an inferior Court, and which has had that direct effect, and that damages at the rate of ten per cent. should be awarded on the amount of the judgment.

POINT V.

The judgment should be affirmed, and damages at the rate of ten per cent. should be awarded upon the amount of the judgment.

Abram J. Rose,
Alfred C. Petté,
Philip M. Brett,
Counsel for Defendant-in-Error.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

JAMES A. WHITCOMB,

vs.

GEORGE S. SHULTZ.

Before:

LACOMBE, WARD & ROGERS, *JJ.*

WARD, *J.*

The Great American Automatic Vending Machine Company, plaintiff's assignor, agreed to manufacture for the Robertson Sales Company 10,000 vending machines like a model submitted. The defendant Whitcomb became surety for the faithful performance of the contract by the Sales Company. By January 1, 1910, the Vending Company had delivered 2100 machines, after which date the Sales Company refused to receive any more. Thereupon the plaintiff brought this action at law against the defendant as surety, to recover the damages sustained by the Vending Company, being first, the balance due unpaid upon the 2100 machines delivered, with interest at six per cent.; second, the cost of materials purchased for the manufacture of the 10,000 machines, less what was used in the 2100 delivered; third, the profits on the 7900 machines remaining to be delivered. The jury returned a verdict for the plaintiff. This is a writ of error to a judgment entered thereon.

Many errors are assigned because of Judge Mack's refusal to charge as requested, but we think that his charge was full, careful and impartial and properly covered the requests.

The defendant relies greatly on the proposition that the plaintiff did not manufacture the machines because it employed other parties to make many of the parts and

therefore has no cause of action. The Court rightly charged the jury that the plaintiff's assignor was not obliged itself to manufacture all the parts. There was evidence that the model submitted was manufactured in the same way and that the officers of the Sales Company knew before they repudiated the contract that the Vending Company was itself making only some parts of the machine, employing third parties to make other parts.

The material question was whether the Vending Company manufactured machines substantially like the model. If it did, it performed its contract. It was not responsible for the operation of the machines. This question was fully and fairly presented to the jury, who decided it in the plaintiff's favor upon a conflict of testimony and this finding is binding upon us.

The defendant also contends that the plaintiff failed to perform the contract because it did not keep in its possession the dies, patterns, etc., so as to be able to conform to the requirement of the contract that it should deliver the same to the Sales Company upon its demand in first class condition upon the completion of the contract. This is a quite immaterial consideration, because the contract never was completed, having been repudiated by the Sales Company after 2100 machines had been delivered.

The trial occupied nearly three weeks and the defendant took a multitude of hypercritical exceptions to the proof of damage offered by the plaintiff. The unpaid balance due upon the machines actually delivered was a mere question of mathematics. In respect to the cost of material ordered by the plaintiff's assignor, there was primary proof, confirmed by the receipted bills of the vendors and the plaintiff's checks in payment thereof. Finally, there was evidence as to the cost of making the machines as compared with the price the plaintiff was to receive, showing the loss of profits. There was sufficient competent evidence to enable the jury to determine the amount of the plaintiff's damages with reasonable certainty and we are not disposed to be astute to discover and discuss errors in this long trial which in our opinion were harmless. The judgment is affirmed.

Opinion, Hand, J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES A. WHITCOMB,

against

GEORGE S. SHULTZ.

HAND, *D. J.*:

The theory of the bill is this: The Machine Company in order to procure the contract represented that they had themselves all the mechanical and industrial means for making the whole machines in their shops, and that they meant to make them there. In fact, unknown to the plaintiff, they had no such facilities and never did make them in the shops nor did they ever intend to do so. This was a fraud which justifies the cancellation of the contract.

There is a very simple and conclusive answer to this reasoning, that is, that as the contract entered into did not require the Machine Company to build the machines in their shops, but only to deliver machines made like the model, the fact is quite immaterial that they could not have done them in their shops. It has now been finally and authoritatively adjudicated between the parties in the action at law that the contract has the interpretation which I have just mentioned and that puts an end to the case. Fraud must touch some matter material to the action of the injured party; it must be a statement about facts whose truth would have kept the victim away from his injury. If the injury of which he complains is entering into a contract, as here, then it must appear that knowledge of the facts would have resulted in his refusing the contract. If the contract allowed the Machine Company to manufacture anywhere,

it is impossible to see how knowledge of the fact that they must manufacture out of their shops, could be material. If the contract was as Whitcomb contended upon the trial of the action at law, a contract to manufacture in the Machine Company's shops only, then the false statements would have constituted fraud, and to manufacture out of the shop would have been insufficient performance.

Of course, a contract may through fraud fail to represent the true intent of the parties and may be reformed for that reason, but no such question is raised here. The plaintiff obviously could not now take that position, and we must suppose that the contract correctly embodied the purpose of the parties to allow the machines to be made anywhere and assembled by the Machine Company. It may perhaps be still further argued, that, although the contract allowed the machines to be made elsewhere, the assurances of the Machine Company gave the plaintiff to suppose that they would in fact be made in the shop. Such an assurance can hardly be the basis of any right when accompanied by a formal undertaking which imposes different obligations, but even if we should assume that it might be the basis of an action for deceit or upon a collateral contract, at least it is absurd to talk about it as a fraud which resulted in the execution of this contract.

If these facts could constitute any such fraud, they would have been a good defense in the action at law because they would have shown that the Machine Company had not substantially performed. They were unsuccessful in that action because the contract was more liberally interpreted and the same interpretation makes it quite impossible to urge that there was any fraud which justifies cancelling the contract. That the court put this construction upon the contract the record abundantly proves. My reliance is upon the judge's charge, and especially upon that part contained between folio 1778 and folio 1790. Here it appears that the only material question left to the jury was whether the machines when made corresponded with the Plumb model; if so, it made no difference where the parts were made. "I find nothing in this contract to justify a claim that the Ma-

chine Company itself had to manufacture all of the parts and all dies, patterns and special tools personally and had to manufacture all those dies, patterns and special tools, for each and every distinct part" (fol. 1780).

The motion is denied. I will give no stay pending an appeal, unless the plaintiff can show me that Shultz is not responsible, nor then either, if the Machine Company will agree to pay any judgment against Schultz, unless the Machine Company is also shown to be irresponsible. In those cases I may consider that question.

July 18, 1914.

LEARNED HAND,
D. J.

Memorandum, Lacombe, J.

Indorsed on the Notice of Motion for judgment on Pleadings.

"I concur fully with Judge Hand's opinion; the motion is granted.

Aug. 4, '14.

E. H. LACOMBE,
U. S. Cir. J."

Whitcomb *v.* Shultz—Equity 11-288.

AMERICAN SURETY COMPANY OF NEW YORK v. SHULZ.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 643. Argued February 23, 1915.—Decided April 5, 1915.

Under § 24, Judicial Code, the District Court has jurisdiction of a suit to enforce a supersedeas bond given under §§ 1000 and 1007, Rev. Stat. Such a suit is one of a civil nature arising under the Constitution or laws of the United States even though the suit in which the bond was given was not one so arising.

A supersedeas bond is not a substitute for the judgment in a civil suit for which it is given—the judgment and bond are distinct; the former rises out of the common law and the latter out of a law of the United States.

THE facts, which involve the jurisdiction of the District Court of the United States under § 24 Judicial Code, are stated in the opinion.

Mr. Charles F. Carusi, with whom *Mr. Henry C. Wilcox*, *Mr. Walter B. Grant* and *Mr. Joseph M. Gazzam* were on the brief, for plaintiff in error.

Mr. Abram J. Rose, with whom *Mr. Alfred C. Petté* and *Mr. Philip M. Brett* were on the brief, for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

Shultz brought suit in a New York court against Whitcomb for breach of contract. The case was removed to the United States District Court for the Southern District of New York, where the plaintiff recovered a judgment for $25,000. The defendant, Whitcomb, in order to take the case to the Circuit Court of Appeals, gave a supersedeas

bond for $30,000, with the American Surety Co. as security. The judgment was affirmed, and not having been paid, Shultz brought suit on the bond against the Surety in the United States District Court for the Southern District of New York.

The defendant demurred on the ground that the Federal court had no jurisdiction. The demurrer was overruled and the case was brought here by the Surety Company, where it contends that though the bond may have been given by virtue of the laws of the United States, "the suit thereon did not involve any controversy respecting the validity, construction or effect of such law" and hence the Federal court was without jurisdiction—the parties not being citizens of different States. *Shulthis* v. *McDougal*, 225 U. S. 561.

This conclusion would be correct if the suit is to be treated as an ordinary action on a sealed instrument voluntarily given. *Lovell* v. *Newman*, 227 U. S. 425. But while in a sense the supersedeas bond was the contract of the Surety Company it was not made in pursuance of any agreement with Shultz and could have been given over his objection, since the laws of the United States (Rev. Stat., §§ 1000, 1007) declared that a writ of error could be obtained by the defendant filing an approved bond with surety conditioned to make good his appeal. Such a bond operated to stay the judgment. Conversely, when that judgment was affirmed, the same laws of the United States gave Shultz a right of action on the bond, and in the suit to enforce that right the measure of his recovery depended upon the construction to be given the Federal statute. Such a suit to enforce such a right could be brought in the United States court by virtue of § 24 of the Judicial Code, which declares that the District Court has jurisdiction of any suit of a civil nature at common law which "arises under the Constitution or laws of the United States."

While there has been no ruling by this court as to

whether a suit on a supersedeas bond can be said to 'arise out of the laws of the United States,' yet there would seem to be no doubt on the subject when the source and nature of the plaintiff's cause of action is considered. If there was room for discussion, the matter is concluded by *Bock* v. *Perkins*, 139 U. S. 628, and *Sonnentheil* v. *Morlein Co.*, 172 U. S. 401, where it was held that a suit on a United States marshal's bond was one arising under the laws of the United States which, therefore, could be brought in the Federal court without regard to the citizenship of the parties. Compare *Tullock* v. *Mulvane*, 184 U. S. 497, 506.

The Surety Company insists, however, that those cases relate to suits on bonds intended to secure the performance of a Federal duty by Federal officers and are not applicable to a case like this, where the suit is on a bond given to supersede a judgment which did not arise out of the laws of the United States but was a mere evidence of a liability which arose at common law and became a security therefor. *Tennessee* v. *Union Bank*, 152 U. S. 454; *Metcalf* v. *Watertown*, 128 U. S. 587; *Provident Society* v. *Ford*, 114 U. S. 635, 641. In effect the argument is that Whitcomb's common law liability was superseded by the judgment; the judgment was superseded by the bond, and as the judgment did not arise under the laws of the United States, neither did the right of action on the bond, which was a mere substitute for the judgment.

But the bond is not a substitute for the judgment nor is it of the same nature. Indeed, it was given for the very purpose of preventing the plaintiff from enforcing it and to enable the defendant, Whitcomb, to prosecute an appeal in an effort to have it set aside. The judgment and the bond were wholly distinct, and arose out of different laws—one out of the common law, the other out of a law of the United States. When the amount of Whitcomb's liability for breach of contract had been adjudged by the Federal court the plaintiff was entitled, at once, to enforce

payment by levy and sale. The laws of the United States, however, intervened and gave to the defendant a means of preventing immediate collection and possibly of defeating the judgment. This delay,—which was helpful to the defendant,—was granted by a Federal statute on condition that he would file a bond with surety conditioned to pay the plaintiff in the event the defendant failed to make good his appeal. If that appeal was not made good the plaintiff's right of action likewise arose out of a Federal statute. A court of the United States had jurisdiction to determine whether there had been a breach of the condition and, if so, the extent of plaintiff's rights and of the defendant's liability under such law. The judgment of the District Court is

Affirmed.